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APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 903

RISS & COMPANY, INC.,
Petitioner,

v.

THE ASSOCIATION OF WESTERN RAILWAYS, TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, EASTERN RAILROAD PRESIDENTS CONFERENCE, CARL BYOIR & ASSOCIATES, INC., and THE PENNSYLVANIA RAILROAD,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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[267 F. 2d 657]

United States Court of Appeals
For the District of Columbia Circuit

April Term, 1958.

Atlantic Coast Line Railroad Company, et. al.,

Petitioners,

v. No. 14,562.

Riss & Company, Inc.,

Respondent.

Before: Bazelon, Bastian and Burger, Circuit Judges.

ORDER.

This case came on for consideration on the order of the District Court entered May 26, 1958, denying petitioners' motion to suspend proceedings pending a determination by the Interstate Commerce Commission of whether prior Commission-Approved agreements are applicable to the reduced rate agreements referred to in Paragraph 18 of the Complaint as supplemented, whether such rates are otherwise lawful and whether respondents have abused the processes of the Commission, on petitioners' motion to file a petition for writ of certiorari, petitioners' petition for writ of certiorari, petitioners' brief in support thereof, respondent's brief in opposition thereto, the transcript of proceedings in the District Court and on arguments of counsel.

Whereas the order of the District Court is not a final order appealable under 28 U. S. C., § 1291, nor an interlocutory order appealable under 28 U. S. C., § 1292, and it appears that petitioners sufficiently allege a conflict of

jurisdiction between the District Court and an administrative agency, and sufficiently show that postponed appellate review may work hardship on petitioners, **United States Alkali Export Ass'n v. United States**, 325 U. S. 196, 202, 203 (1945), and

Whereas it appears, from the District Court's memorandum opinion in support of the order, that the District Court relied upon the decision of this court in **Atchison, Topeka & S. F. Ry. Co. v. Aircoach Transport Assn.**, ... U. S. App. D. C. ..., 253 F. 2d 877 (1958), and did not consider in its opinion the effect of **Federal Maritime Board v. Isbrandtsen Co.**, 356 U. S. 481, 499 (decided May 19, 1958), and

Whereas it is the view of this court that the **Isbrandtsen** opinion modifies the holding of the **Aircoach** case by requiring that the issue of the intent and effect of an agreement approved by the Commission must, in a case where such issue is the sole or dominant issue in the case, first be referred to the Commission prior to a court determination of whether such agreement violates the anti-trust laws, and

Whereas it is the view of this court that the **Isbrandtsen** decision does not necessarily require referral to the Commission of issues such as those sought to be referred to the Commission by petitioners' motion where the agreement is only one of a considerable number of overt acts alleged and where the policy favoring referral is clearly outweighed by other factors such as the probability of undue delay and the overriding importance of early consideration of the other overt acts alleged, and

Whereas the District Court, having considered this case in all of its aspects, is in a better position to determine whether, on balance, suspension of proceedings is warranted,

It is hereby, **ordered** that petitioners' motion for leave to file a petition for writ of certiorari and petitioners' petition for writ of certiorari are **granted**, and the case is **remanded** to the District Court with directions to vacate its order of May 26, 1958, and to reconsider petitioners' motion to suspend proceedings in light of this order.

Per Curiam.

Dated: August 8, 1958.

ORDER.

This case came on for consideration on petitioner's motion for clarification of an order of this court in this cause dated August 8, 1958, respondent's reply thereto, the motion of Aircoach Transport Association, Inc., et al., for leave to file a memorandum of law as amicus curiae and to participate in oral argument, the lodged memorandum of Aircoach Transport Association, Inc., et al., and respondent's reply to the motion of Aircoach Transport Association, Inc., et al.

It appears therefrom that the order of August 8, 1958, did not fully set forth the view of this court concerning the effect of **Federal Maritime Board v. Isbrandtsen Co.**, 356 U. S. 481, 499 (1958), upon the decision of this court in **Atchison, Topeka & S. F. Ry. Co. v. Aircoach Transport Assn.**, ... U. S. App. D. C. ..., 253 F. 2d 877 (1958). The intent, however, of the order of August 8 was to assert our view that the Isbrandtsen opinion modifies the holding of the **Aircoach** case by requiring that the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Sec. 5a of the Interstate Commerce Act, must, in a case where such issue is the sole or dominant issue, first be referred to the Commission prior to a court determination of whether such rate reduction violates the anti-trust laws. The "issue" referred to in

the order was not intended to enlarge the issue of the applicability of Sec. 5a agreements to the rate reductions.

It is therefore Ordered that petitioner's motion for clarification of the order of August 8, 1958, is granted to the extent indicated in the foregoing paragraph.

It is Further Ordered that the motion of Aircoach Transport Association, Inc., et al., for leave to file a memorandum of law as amicus curiae is granted, but its motion for oral argument is denied.

Per Curiam.

Dated: December 16, 1958.

[170 F. Supp. 354.]

United States District Court for the District of Columbia.

Riss & Company, Inc., Plaintiff. vs. Association of American Railroads et al., Defendants.	Civil Action No. 4056-54.

OPINION.

On August 8, 1958, the United States Court of Appeals for the District of Columbia remanded this case to the District Court with directions to vacate its order of May 26, 1958, and to reconsider petitioners' motion to suspend proceedings in the light of said order.

In the early part of 1958 petitioners moved to suspend all proceedings in this antitrust litigation except discovery not connected with this motion, and urged the Court to refer to the Interstate Commerce Commission one of the

issues set forth in the complaint regarding rate-making, pursuant to agreements on procedure filed with the Commission, so that the Court might obtain a ruling on whether these joint rate reductions were immunized from the operation of the antitrust laws. Extensive briefs were filed and the Court heard oral arguments. After delivering an oral opinion from the bench, the Court denied the motion in an order entered May 26, 1958. Relying strongly on a recent Supreme Court decision not mentioned by the Court in its oral opinion, most of the railroad defendants then petitioned for a writ of certiorari from the Court of Appeals and asked that court to reverse this Court's order and to direct this Court to suspend proceedings and refer the above issue to the Commission. The Court of Appeals granted the writ, but declined to rule on the merits. Instead, it remanded the case to this Court with directions to vacate the order of May 26 and to reconsider petitioners' motion in the light of its order and of the Supreme Court's recent holding in **Federal Maritime Board v. Isbrandtsen Co. et al.**, 356 U. S. 481 (1958).

Petitioners then requested the Court of Appeals to clarify certain language in its order of August 8, 1958. The Court granted this request in an order dated December 16, 1958.

Before discussing the legal issues raised by this motion, it is necessary to summarize the background of this complex case so that all issues may be viewed in their proper context.

In 1954 Riss & Company, Inc., a common carrier by motor vehicle in interstate commerce, filed this civil antitrust suit, seeking an injunction and $90,000,000 in treble damages. It alleged that beginning in or about 1950 defendants, most of whom are railroad companies, had agreed and conspired in unreasonable restraint of trade and commerce to injure or destroy plaintiff's business and to ac-

quire a monopoly of land transportation of property in the United States, and had thus violated Sections 1 and 2 of the Sherman Act (15 U. S. C., §§ 1, 2).

Plaintiff alleges it has been a common carrier of property by motor vehicle since 1927 and operates as authorized by the Interstate Commerce Commission throughout twenty-two states plus the District of Columbia. It uses over 800 truck units and employs over two thousand persons. Riss also has alleged that during the years from 1950 to 1953, inclusive, it was one of the five largest interstate motor carriers in the United States in terms of gross revenues and is, and has been for several years, one of the largest motor carriers of military supplies, including ammunition and explosives, for the Armed Forces. About fifty-eight first-class railroad companies, several joint railroad organizations and trade associations and one public relations firm are defendants in this action.

In order to effectuate the object of the alleged conspiracy, plaintiff charges that defendants employed various means, some of which are cited as examples in the complaint. Defendants are accused of having carried on a program of soliciting, directly as well as indirectly through "front" organizations, the elected and appointed officials of various states to take steps leading to the revocation and cancellation of the interstate operating authority held by plaintiff. In 1952 it is alleged that some of the defendants employed a public relations expert to persuade the Public Utilities Commission of Ohio to file proceedings before the Interstate Commerce Commission looking toward the cancellation of plaintiff's operating authority.

By similar methods of solicitation, according to the complaint, officials of states, cities and towns through which plaintiff operates, were urged by defendants to enact statutes, ordinances and regulations designed to unduly hamper the operations of the plaintiff and to render them economi-

cally unfeasible, such as by imposing unreasonably low weight limits on truck shipments or by banning the use by plaintiff's vehicles of certain important highway routes. Defendants are also alleged to have urged, directly and indirectly through "front" organizations, that state officials carry out a campaign of unusually strict enforcement of statutes, ordinances and regulations particularly aimed at plaintiff's vehicles such as by urging the Public Utilities Commission of Ohio to assign special investigators to follow plaintiff's trucks for hundreds of miles in order to discover possible violations.

Defendants also are alleged to have abused their privilege of intervention in proceedings before the Interstate Commerce Commission. According to plaintiff, defendants joined together to carry on an extensive and vicious campaign of anti-truck propaganda in order to persuade citizens' groups, automobile clubs and other neutral organizations to register their complaints against Riss in the course of proceedings started by Riss before the I. C. C. to obtain new operating authorizations. Other unfair competitive practices, such as circulating and publishing false and malicious statements about Riss and its officers are also charged in the complaint.

According to the complaint, defendants used railroad groups in their public relations campaign as well as "front" organizations whose connection with the railroads would not be known to the public. It is also asserted that defendants tried to infiltrate and make use of several independent public organizations such as the Illinois Parent-Teachers Association and the Congress of Parents and Teachers of Oklahoma in order to achieve their unlawful objectives. Chief reliance, however, is alleged to have been placed on such instrumentalities as "Competitive Transportation Research," "Motor Carrier Bureau" and "Committee on Motor Transportation" set up by defendants, as

well as upon other temporary committees and organizations. Plaintiff claims that defendants spent large sums of money, estimated at about $1,000,000, in carrying out their unlawful activities.

In January, 1958, with the permission of the Court, plaintiff filed a supplement to its complaint, which is embodied in paragraph 18. Plaintiff claims therein that, pursuant to the unlawful plan described above, defendant railroads submitted to traffic officials of the Department of Defense in 1955 a forty per cent reduction in rate on the carriage of explosives, totaling more than 50,000 pounds by railroads competing with Riss for the same kind of traffic. It is plaintiff's claim that this reduction was intended to accomplish one of the principal objects of the conspiracy, i. e., to exclude plaintiff from the explosives traffic, and it has allegedly had that effect with respect to the principal points served by the plaintiff.

Plaintiff further alleges that defendants' conduct has caused serious damage to its business and to its reputation and has forced plaintiff to spend large sums to counteract the effects of defendants' conduct. By way of relief plaintiff demands the following:

> "1. Injunctive relief permanently enjoining and restraining AAR, Western Railways, Presidents Conference and Eastern Railroads, and each of them, from creating or continuing any committees, subcommittees, bureaus, departments, sections, divisions, subdivisions, or other association activity, the principal purpose of which is to restrain, impede, impair, hamper, harass or eliminate the competition of plaintiff and of other motor carriers;
>
> "2. Injunctive relief permanently enjoining, restraining and prohibiting defendants and each of them and their officers, directors, agents, servants and employees

from agreeing, conspiring or combining to restrain the competition of plaintiff and from conspiring, combining and attempting to monopolize land transportation by the elimination of plaintiff and from performing any acts in furtherance of such unlawful objects and purpose;

"3. Judgment against defendants and each of them for $90,000,000, being the amount equal to three times the damages sustained by plaintiff;

"4. Judgment against defendants and each of them for the amount of reasonable attorneys' fees and costs of this action;

"5. Such other and further relief as to the Court may appear just and proper; and

"6. Injunctive relief enjoining the defendant railroads from accepting traffic pursuant to the illegal quotation described in paragraph 18 hereof."

I.

This is a summary of plaintiff's allegations. In their motion to suspend and to refer the rate reduction issue to the I. C. C., defendants seek to invoke the doctrine of "primary administrative jurisdiction." The defendants contend that a new issue was raised which involves the primary, if not the exclusive, jurisdiction of the Interstate Commerce Commission when plaintiff was allowed by the Court to supplement its complaint and to include in paragraph 18 the allegation that the uniform and concerted rate reduction, which took effect on or about November 20, 1955, was intended to exclude the plaintiff from the business of carrying such shipments of explosives; that said quotation was made for the purpose of effectuating one of the principal objects of the conspiracy, that is, the elimination of the plaintiff as a competitor with the railroads

for explosives traffic. As a defense to this allegation, it is also argued that the new rates are reasonable and compensatory when all the cost factors are taken into consideration, and that, furthermore, the rate quotation was set up according to procedural agreements approved by the Commission and thus is immunized from the operation of the antitrust laws by virtue of 49 U. S. C., §5b (9). It is defendants' position that this matter is extremely technical and complex and thus the Court should obtain the expert opinion of the Commission with respect to defendants' contentions before the case goes to trial.

Plaintiff argues, on the other hand, that it is immaterial whether defendants' act of reducing rates, considered by itself, is covered by prior procedural agreements approved by the Commission or is immunized from the antitrust laws because it is a well-settled principle of law that a lawful act may be properly alleged as a means of effectuating one of the principal objects of the alleged conspiracy; that is, the elimination of plaintiff as a competitor with the railroads for explosives traffic.

These, then, are the basic legal issues before the Court. Certain practical considerations also enter into the case. This private antitrust suit against almost sixty defendants has been on the docket over four years. During that time, five different judges have made rulings on various preliminary motions. In the interest of finally resolving the complex and serious issues raised by this case and of doing so in the spirit of Rule 1 of F. R. C. P., this Court has set October, 1959, as a tentative time for trial. A great deal of work by both Court and counsel will yet have to be done in order to meet such a schedule, and this date may be delayed because of the recent proceedings in our Court of Appeals. Both sides have requested trial by jury, and have estimated that the trial will last from four to six months. The Court's basic problem is this: Should this

important antitrust suit, already more than four years old, and involving issues of serious importance to the national transportation industry, be further delayed for one or perhaps several years in order that the Court might request the expert opinion of the Interstate Commerce Commission as to whether one of many overt acts alleged to have been committed pursuant to a Sherman Act conspiracy ought to be immunized from the operation of the antitrust laws?

The rate reduction issue is raised in paragraph 18 of the Complaint as Supplemented, which reads as follows:

> "18. On or about Oct. 20, 1955, the railroad-defendants herein caused to be submitted to traffic officials employed by the Department of Defense a uniform, unpublished rate quotation, by and on behalf of the railroads engaged in carrying explosives traffic in competition with the plaintiff. Said quotation established railroad rates for carrying explosive shipments totalling more than 50,000 pounds which were nearly forty percent below the general level of such rates prevailing for the previous eight years. Said uniform and concerted rate reduction, which took effect on or about November 20, 1955, was intended to exclude the plaintiff from the business of carrying such shipments of explosives and has had that effect with respect to the principal points served by the plaintiff. Said quotation was made for the purpose of effectuating one of the principal objects of the conspiracy charged herein, to wit, the elimination of the plaintiff as a competitor with the railroads for explosives traffic and has substantially injured the plaintiff's business. The Interstate Commerce Commission has no jurisdiction over said quotation and plaintiff will continue to suffer substantial and irreparable injury from said illegal quotation until and unless the acceptance of traffic pursuant thereto is enjoined by this Court."

In its earlier ruling on this motion, this Court was strongly influenced by the decision in **Atchison, Topeka and Santa Fe Railway Co. et al. v. Aircoach Transportation Association, Inc., et al.**, 102 U. S. App. D. C. 355, 253 F. 2d 877 (1958), hereinafter referred to as ACTA. On motions by both sides for summary judgment, the District Court there had ruled that the concerted quotation by railroads under Section 22 of the I. C. C. Act of certain variable rates and package bids for military passenger traffic were *per se* illegal under the antitrust laws, and that 49 U. S. C., § 5b (9), did not grant immunity from these laws.

In reversing, the Court of Appeals held that it could not be said as a matter of law that **all** joint rate reductions under section 22 must be excluded from the class of concerted actions covered by prior procedural agreements approved by the Commission under 49 U. S. C., § 5b (9), and, therefore, it was error to hold that all such reductions in rate must be denied immunity from the antitrust laws under 49 U. S. C., § 5b (9). Hence, some section 22 rates arrived at by joint action might be within the coverage of prior approved arrangements for rate making and hence might be immunized from the antitrust laws. The Court of Appeals felt that the Commission's prior rulings as to the possible or actual coverage of defendants' conduct by procedural agreements or as to the Commission's power to decide these very questions were not clear and decisive. The Court observed at p. 885:

> "Nevertheless, the questions are appropriate for Commission consideration, even though, as we believe, exclusive primary jurisdiction over either of them does not reside in the Commission by reason of section 5a (7) [49 U. S. C. 5b (7)]."

The Court of Appeals then ruled that the District Court should, in its discretion, withhold decision on the interpretation of the I. C. C. Act and the approved procedural

agreements until the Commission has had a chance to decide initially whether, in its opinion, the railroad rate reductions can be relieved from the antitrust laws because of coverage by approved agreements.

After discussing the relationship of defendants' practices to unlawful price-fixing, the Court of Appeals then set a limitation on the power of the Commission to resolve the antitrust aspect of the rate practice. It said at page 365:

> "One further substantive legal question must be considered. Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a (9). We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of Aircoach for the section 22 transportation involved. See, by analogy, American Tobacco Co. v. United States, 328 U. S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575; State of Georgia v. Pennsylvania R., supra, 324 U. S. at page 458, 65 S. Ct. at page 726; Kobe, Inc., v. Dempsey Pump Co., 10 Cir., 198 F. 2d 416, 422; Noerr Motor Freight, Inc., v. Eastern R. R. Pres. Conf., D. C. E. D. Pa., 155 F. Supp. 768, 814-816, 822-825; Parmalee Transp. Co. v. Keeshin, D. C. N. D. Ill., 144 F. Supp. 480, 484; Noerr Motor Freight, Inc., v. Eastern R. R. Pres. Conf., D. C. E. D. Pa., 113 F. Supp. 737, 742-744; Slick Airways, Inc., v. American Airlines, Inc., D. C. D. N. J., 107 F. Supp. 199, 214, **appeal dismissed sub. nom.** American Airlines, Inc., v. Forman, 3 Cir., 204 F. 2d 230, certiorari denied 346 U. S. 806, 74 S. Ct. 54,

98 L. Ed. 336; United States v. Association of American Railroads, D. C. D. Neb., 4 F. R. D. 510, 526. . . . The motion of Railroads is not to be construed as admitting factual **allegations in regard to a purpose to destroy competition which would have the legal result of removing Railroads from any possible protection from the antitrust laws**; nor can Aircoach's motion be construed as abandoning those allegations. Thus, on this aspect of the case, there remains a factual dispute. Moreover, this aspect of the case need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law.

"There thus arises a matter of procedure. As to this, a discretion must be left to the District Court after hearing the parties. It might be considered preferable, if Aircoach desires to pursue the assertions regarding a purpose to destroy competition, that this branch of the case should be the subject of a hearing, limited to that problem. Should Aircoach prevail Railroads would be liable in damages, and an appropriate injunction also could be granted. Or proceedings in the District Court on this subject could await reference to the Commission of the questions of coverage by statute or approved agreement." (Emphasis supplied.)

The case of **American Tobacco Company v. United States,** 328 U. S. 781, 809, decided in 1946 and cited above was a criminal action brought under the Sherman Act and the defendants, who were officers of large tobacco companies, were convicted on four counts of an indictment charging conspiracy in restraint of trade, monopolization, attempting to monopolize, and conspiracy to monopolize. In the petition for certiorari the question was limited to "whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act."

At page 809 the Court said:

> "It is not the form of the combination or the particular means used but the result to be achieved that the Statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. . . . ."

The case of **State of Georgia v. Pennsylvania Railroad Company**, 324 U. S. 439, decided in 1945, was a suit by a state charging that the defendant railroads had set up rates that discriminated against the ports and cities of Georgia and greatly hampered the industrial and economic development of the entire state, in violation of the antitrust laws.

One of the defendants' contentions was that the I. C. C. had jurisdiction over these rate matters and had actually approved these rates under I. C. C. Act standards. The court held that carriers are also subject to the antitrust laws. Even though the rates had to be cleared through the I. C. C., it may be that circumstances make these rate agreements restrictive rather than competitive. The court said that a conspiracy to fix rates might be illegal though the rates fixed were reasonable and nondiscriminatory, and, as Mr. Justice Brandeis had said in the **Keogh** case (260 U. S. 156), the fact that rates had been approved by the I. C. C. would not, it seems, bar proceedings by the Government.

The court then stated:

> "It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates

clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier." (Emphasis supplied.)

It is clear from the above language in the ACTA case that a court need not refer to the Commission the issue of whether a rate quotation was made as part of a combination or conspiracy to eliminate a competitor. This follows logically because such a joint act if combined with the unlawful intent of eliminating a competitor would fall outside of the immunity granted by 49 U. S. C. 5b (9) regardless of a possible I. C. C. ruling that the methods of arriving at the new rate conformed to prior procedural agreements filed with and sanctioned by the Commission. The Court of Appeals also authorized a separate hearing on the allegations of intent to destroy competition which might, if the defendants in ACTA lost, result in a determination of liability and an award of damages and injunctive relief. Thus, a clear distinction was drawn between the antitrust aspects and the technical rate-making issues in the ACTA case. In ACTA, both aspects grew out of the same type of activity, namely, section 22 rate quotations. The lawfulness of these quotations formed, for all practical purposes, the sole issues of that case. Since the Court of Appeals authorized the District Court, in ACTA, in its discretion, to itself decide the fundamental questions of antitrust liability and damages, it seems to be far more important to follow that reasoning in this case where the technical aspects of section 22 rate-making constitutes only one part of the issue raised by paragraph 18 of the complaint as supplemented and where this rate reduction itself forms only one out of the many overt acts alleged by the plaintiff.

However, in the view of the Court of Appeals, the decision of the Supreme Court in **Federal Maritime Board v.**

Isbrandtsen Co. et al., 356 U. S. 481 (1958), has modified the holding in ACTA by placing on District Courts a duty under clearly defined conditions to refer certain issues to administrative agencies. The Court of Appeals in its order dated August 8, 1958, stated as follows:

> ". . . it is the view of this court that the **Isbrandtsen** opinion modifies the holding of the **Aircoach** case by requiring that the issue of the intent and effect of an agreement approved by the Commission must, **in a case where such issue is the sole or dominant issue in the case**, first be referred to the Commission prior to a court determination of whether such agreement violates the anti-trust laws. . . ." (Emphasis supplied.)

Answering defendants' motion for clarification of the above language, the Court of Appeals in an order dated December 16, 1958, stated as follows:

> ". . . The intent, however, of the order of August 8 was to assert our view that the Isbrandtsen opinion modifies the holding of the **Aircoach** case by requiring that the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Sec. 5a of the Interstate Commerce Act, must, in a case where such issue is the sole or dominant issue, first be referred to the Commission prior to a court determination of whether such rate reduction violates the anti-trust laws. The 'issue' referred to in the order was not intended to mean the issue of the applicability of sec. 5a agreements to the rate reductions."

The Court, in its order of August 8, interpreted **Isbrandtsen** as applying to a factual situation more in line with the case at bar, and used the following language:

". . . . it is the view of this court that the **Isbrandtsen** decision does not necessarily require referral to the Commission of issues such as those sought to be referred to the Commission by petitioners' motion **where the agreement is only one of a considerable number of overt acts alleged and where the policy favoring referral is clearly outweighed by other factors such as the probability of undue delay and the overriding importance of early consideration of the other overt acts alleged**. . . . " (Emphasis supplied.)

Before considering the precise way in which **Isbrandtsen** modified ACTA with respect to this case, it may be noted that this Court, at the request of defendants, had considered **Isbrandtsen** before it denied the original motion to suspend.

The sequence of events leading up to this Supreme Court decision is of importance in determining its scope. In 1952, an association or "conference" of steamship lines engaged in foreign trade adopted a dual system of international freight rates. Under this system, a shipper would pay less than regular rates for the same service if he signed an agreement to patronize the conference exclusively. The ostensible purpose of the dual-rate arrangement was to meet the competition of an independent carrier, Isbrandtsen Co., Inc. The proposed system was submitted to the Federal Maritime Board for approval pursuant to law, and orders of approval were issued in December, 1955, and January, 1956. Isbrandtsen Company, Inc., petitioned our Court of Appeals to review these orders. That Court set aside the Board's order on the ground that the system of dual rates was illegal *per se* under § 14 of the Shipping Act of 1916 [99 U. S. App. D. C. 312, 239 F. 2d 933 (1956)].

The Supreme Court granted certiorari to resolve the issue as to the legality of the dual-rate system and stated in its opinion at page 487:

> "The question for our decision is whether the Court of Appeals correctly set aside the Board's orders."

The Supreme Court agreed with the Court of Appeals and held that the dual-rate system was illegal.

Examination of the opinion shows that the case was not decided by application of the doctrine of "primary administrative jurisdiction". Under this doctrine, the courts often decline to determine a controversy, first presented to it, where it involves a question which is within the jurisdiction of an administrative agency, prior to the decision of that question by the administrative tribunal, and where the question demands the exercise of administrative interpretation requiring the special knowledge, experience and services of the agency to decide technical and intricate matters of fact.

The court in **Isbrandtsen** discussed this practical policy of judicial administration in the course of explaining the rulings in two of its earlier decisions which had been relied upon by Far East Conference. On page 496 of its opinion, it said:

> "Petitioners argue that our construction of § 14 Third is foreclosed by this Court's decisions in United States Nav. Co. v. Cunard S. S. Co., 284 U. S. 474 (76 L. Ed. 408, 52 S. Ct. 247); and Far East Conference v. United States, 342 U. S. 570 (96 L. Ed. 576, 72 S. Ct. 492). A reading of those opinions immediately refutes any suggestions either that this issue was expressly decided in those cases or that our holding here is not fully consistent with the disposition of those cases."

The Court then summarized petitioners' contentions as follows:

> "The Board and the Conference argue that, if the Court in these earlier cases had thought that § 14

Third in any way makes dual rates *per se* illegal and thus not within the power of the Board to authorize it would not have found it necessary to require that the Board first pass upon the claims."

In rejecting this reasoning, the Court said at page 498:

"It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed."

Thus, it is clear that the problem of whether or not a district court should refer certain issues to an administrative agency was not squarely before the court in the **Isbrandtsen** case.

The question next arises: In what precise way does **Isbrandtsen** modify ACTA? ACTA contained two basic holdings. The first related to the proper forum for decision of issues as to the procedural agreements and their connection with Section 22 rate practices. The second dealt with the exceptional circumstances under which Sec. 5a immunity would not apply. On the first issue, the Court of Appeals held in the ACTA case that the I. C. C. and the District Court had concurrent jurisdiction to decide the intent and effect of approved procedural agreements in relation to Section 22 rates, and whether coverage by these agreements would immunize these rates from the antitrust laws. On page 364 of that opinion the court stated as follows:

"**In short, the court, while retaining jurisdiction, should in its discretion withhold decision on the interpretation of the statute and existing agreements approved under section 5a**, insofar as the challenged practices are concerned, until the Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be relieved of the operations of the antitrust laws under the statute and, if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date. **The Commission might disclaim jurisdiction, or for some other reason might refrain from deciding these questions. We do not hold that it is required to decide them. The court could then proceed according to its own light to interpret either the statute or the agreements.**" (Emphasis supplied.)

On the second question, it was held in ACTA that, under no circumstances could antitrust immunity under 49 USC 5b (9) be held to apply to the use of approved procedures to set Section 22 rates if they were part of an effort by railroads in combination or conspiracy to eliminate the competition of Aircoach.

It is clear from the language in its order that the Court of Appeals interpreted **Isbrandtsen** as modifying the first holding in ACTA only by limiting the District Court's discretion to refer issues.

It is the governing rule now that the issue of the intent and effect of a rate reduction, claimed to have been taken pursuant to procedures set forth **in agreements approved by the Commission** under Section 5a of the Interstate Commerce Act, must, **in a case where such issue is the sole or dominant issue**, first be referred to the Commission prior to a Court determination of whether such rate reduction violates the antitrust laws.

Thus, it would appear that the second holding of ACTA stands unaffected by **Isbrandtsen**.

If plaintiff, during the trial, cannot prove an affirmative answer to this question, then it concedes it cannot recover based on the rate reduction issue. On the other hand, if it should develop at the trial that the plaintiff can prove that the rate reduction as set forth in paragraph 18 was one of several overt acts alleged, and prove that this rate reduction was made for the purpose of effectuating one of the principal objects of the conspiracy charged therein; that is, the elimination of the plaintiff as a competitor with the railroads for explosives traffic, then under ACTA no amount of coverage by approved agreements and no degree of immunity under 49 U. S. C. 5b (9) could remove the rate reduction from the prohibitions of the Sherman Act.

In reaching either of these alternatives, no determination by the Commission seems necessary on the above contentions made by the plaintiff. Even if the Commission were to decide that the rate reduction, considered by itself, conformed to the standards of the Interstate Commerce Act, it is nevertheless well settled that a lawful act may be validly alleged as forming a part of a conspiracy for an unlawful purpose such as to restrain trade. **Noerr Motor Freight v. Eastern Railroad Pres. Conf.**, 155 F. Supp. 768 (E. D. Pa. 1957).

The basic reason behind defendants' motion to suspend is the expectation of obtaining an I. C. C. ruling that the Section 22 rate reduction is "immunized" from the operation of the antitrust laws by 49 U. S. C. 5b (9). This Court cannot say how the Commission would be likely to rule if this issue alone were submitted to it. After a substantial delay in the final disposition of this issue, it is possible that defendants might obtain an adverse ruling. Then all the harmful effects that a long delay brings to

protracted litigation would have been endured to no purpose.

The result would not be different if the defendants won all of their arguments before the Commission. In effect, the Commission would be ruling that the Section 22 rate reduction on explosives, standing alone, were covered by approved agreements on rate procedures and that therefore they are removed from the operation of the antitrust laws by 49 U. S. C. 5b(9). Thus, no antitrust suit could be brought based on the act of reducing rates alone. This would simply mean that a private party could not validly file a complaint alleging that defendants violated the antitrust laws solely because they concertedly lowered the rates on explosives traffic for the United States Government. Without such an immunity provision, railroads would often be suspected of combining to fix prices when they make even routine changes in their rates in cooperation with each other. The railroads are right in their contention that cooperative or joint rate-making is often essential, especially when the goods in question are normally handled by many companies on a vast, interlocking rail system. As the court in ACTA observed at 102 U. S. App. D. C. 355, 361, 253 F. 2d 877, 883 (1958):

> ". . . Furthermore, upon the basis of extensive testimony in committee hearings on section 5a, bearing on its possible application to section 22 'rate adjustment' or reduced rates for war materials, the House and Senate Committee Reports pointed out that the evidence was convincing that the joint organizations maintained by the carriers were not only necessary to enable them to meet the commercial requirements of the nation but also were indispensable to the requirements of national defense."

Thus, it would seem that the antitrust immunity that defendants invoke was designed to protect ordinary rate-

making in the course of regular business so as to adjust to changing costs and to meet the challenges of outside competition. Could the protection of 49 U. S. C. 5b (9), assumed above, extend to the use of the power to set rates in concert as part of a plan or conspiracy to eliminate competition? According to the holding in ACTA quoted above it could not. Even if a given joint act of reducing rates were to be considered as lawful standing by itself, it may still be properly alleged as one of the means used to effectuate a conspiracy to accomplish an unlawful object. This is clear from the cases cited in the ACTA opinion.

Thus, the rate issue is an integral part of the alleged conspiracy, and cannot be evaluated apart from the other allegations in the complaint. There are two possibilities that would result from referral to the I. C. C. If the I. C. C. heard argument or conducted a hearing solely upon the immunization issue raised by defendants, then its ultimate ruling would, under the plaintiff's allegations, certainly be indecisive. On the other hand, the parties might be permitted to present all of the issues raised by the pleadings so that the Commission could get the entire picture. This would be a laborious way to resolve only one issue in this complex case. Several months would probably be required to present all of this evidence. Furthermore, at the end of this process plaintiff, if it prevailed, would still be unable to obtain the substantive relief it seeks here. An entire retrial of the case would then be necessary in the District Court.

The Court must conclude, therefore, that a reference of the rate-reduction issue to the I. C. C. would be a waste of time and effort and would entail unnecessary expense on the part of all parties to this litigation.

Furthermore, it is also clear that the intent and effect of the Section 22 rate-reduction is in no sense the dom-

inant, much less the sole, issue of this litigation. The complaint as supplemented alleges a complex conspiracy in violation of the Sherman Act. A concerted reduction in explosives rates is alleged to have been one of the many overt acts designed to effectuate the unlawful plan. When the plaintiff filed the original complaint the rate issue was not included and the other allegations were relied upon to constitute a cause of action.

Defendants, in their supplemental memorandum filed September 29, 1958, try to de-emphasize the non-rate allegations of the complaint. On page 8 it is said:

> ". . . There may be some evidence relating to the alleged campaign of defamation. But this will be only to lend color to plaintiff's claim that there is a continuing conspiracy among the defendants.
>
> * * * * * * * *
>
> "Obviously, plaintiff can say that the complaint raises issues as to defamation. But the assertion of issues does not make them substantial."

However, in the course of oral argument on this motion on May 23, 1958, this Court asked Mr. Ball, counsel for some of the defendants, whether he would be willing to stipulate that the non-rate or other charges contained in plaintiff's complaint are true if the rate-reduction issue by itself were sent to the I. C. C. (Tr. pp. 95, 96, 97). The exact colloquy is as follows on page 95 of the Transcript of Proceedings before the Court on May 23, 1958:

> "The Court: Let me ask you this. I don't suppose you would consent to this. I wouldn't either if I were you. Would you be willing to go over to the Commission and say to this Commission, in effect, this: that we admit for the purpose of this case, if it sent over there, that we are guilty of every single thing that the plaintiff says we are guilty of in this com-

plaint; but regardless of that, the Act which you have been speaking about, which enacted 5a, I think, of the Interstate Commerce Commission Act, immunizes us from the antitrust laws, so it makes not a particle of difference whether or not we were guilty of any conspiracy?

Mr. Ball: I cannot say that because the complaint——

The Court: Would you do that?"

Furthermore, these allegations of defamation as well as other charges are not unique to this case. In **Noerr Motor Freight**, cited above, several of the allegations appear to resemble some of those in this litigation. It, too, was a private antitrust suit for treble damages and injunctive relief brought by trucking firms against railroads, rail associations and a public relations firm. At the outset, Judge Clary, the trial judge, felt that the charges seemed somewhat incredible. Cf. 155 F. Supp. 808. After presiding over a four month trial, the judge made the following finding, on page 816:

"The proofs in this case have definitely established joint action on the part of all of the defendants to destroy the good will and injure the business of the plaintiffs. They have proved the formation of so-called 'independent citizen groups' which were mere pawns in circulating information derogatory to the plaintiffs; dissemination of false information to customers of the plaintiffs for the same purpose, the organization of groups to protect the use of the highways by plaintiffs' 'Big Trucks', and the duping and using of public officials and officials of independent organizations to accomplish the same purpose of driving the plaintiffs out of competition with the defendants. The actions of the defendants do not fall within legal bounds of either proper means or proper ob-

jectives and consequently such activities must be condemned."

After a separate hearing on the issue of relief and damages, the Court enjoined defendants from continuing the conspiracy charged and awarded $652,000 damages plus $200,000 counsel fees. Cf. 166 F. Supp. 163. The judgment is now on appeal.

Defendants also contend that plaintiff's request for injunctive relief to prevent further acts unrelated to the rate cut is not to be taken seriously, because plaintiff has made no effort to seek a preliminary injunction. This failure, it is argued, shows that plaintiff does not really think it can show substantial injury resulting from the alleged defamation campaign. But more reasonable inferences may also be made. The size and scope of the conspiracy alleged would make necessary a lengthy and costly hearing. Preparation for this would involve the same kind of detailed discovery that is now going on in preparation for the trial itself.

"Mr. Ball: I would not, because the complaint alleges things that go beyond the rate-making actions themselves.

The Court: I understand. I didn't expect you to do it, frankly. I mean that I am saying that it seems to me that a hearing would have to be conducted over there, pursuant to the ACTA case, to determine whether or not the defendants were guilty of the very things that the plaintiff says they were guilty of. I don't know whether they are or not, and I am not going to know until the evidence is in this case.

Mr. Ball: Now, let me clarify one point. The Commission is not going to decide whether we went before or did the public relations job.

The Court: Of course, they are not going to decide that.

Mr. Ball: Those are the allegations that are not rate-making allegations.

The Court: I understand that.

Mr. Ball: But the Commission is the one that has got to decide.

The Court: They are going to decided whether or not this agreement, the way it was prepared and agreed to, they are going to decide whether or not that agreement itself was a valid agreement, correct?

Mr. Ball: And first and second whether the activities under it were in accordance with it and, third, whether the rate made under it, was it made in accordance with it, or whether there was a predatory practice or some violation of transportation policy.

The Court: I understand, and they will limit their investigation and hearing on that point.

Mr. Ball: Now, with that——

The Court: These points."

Counsel declined to so stipulate and thus impliedly recognized the importance of those allegations if they could be established as true.

On the factual importance of these non-rate allegations, little can be said at this stage of the case. The parties are in the midst of discovery and the over-all picture is far from complete. It is impossible now to tell what evidence the plaintiff will present at the trial. Isolated statements of plaintiff's officers in answer to interrogatories and by way of depositions cannot be the basis for judging the weight or importance of evidence, as it may develop at trial, months from now. The procedure of waiting until the case has been presented on its merits was followed in the Noerr case and, furthermore, a separate hearing on the question of relief and damages was there held some time after the trial. Thus, no inference adverse to plaintiff can be made based on its failure to seek an injunction before the trial on the merits.

From the above discussion, it is clear that the purely legal standards for referral of the rate reduction issue to the Commission have not been met. It is not the sole or dominant issue of the case and no possible ruling as to its coverage by prior approved procedural agreements would be conclusive where such rate reduction is alleged to be part of a conspiracy to restrain trade. At this point, certain practical aspects of the referral problem must be considered.

In the first place, undue delay with accompanying hardship and expense to the parties would almost certainly result if this issue were referred to the Commission. The rate question, while not the sole or dominant issue of the case, is, nevertheless, an essential segment of plaintiff's cause of action and equally as important as the other allegations. The trial on the merits could not proceed properly with this aspect of the case missing. Referral would delay the entire litigation. This Court has no power to compel the Commission to make any ruling at all, much less to bring about a prompt decision. A determination would have to await its turn on the Commission's crowded docket. It might be that many months would pass without Commission action. The Court would then probably have to wait a reasonable time before itself taking action, and this might amount to one or more years. What "a reasonable time" might be can perhaps be gauged by examining the duration of past Commission proceedings involving numerous parties. In the memorandum filed by plaintiff, it cites the so-called Government reparations suits as an example. These actions involved many of defendants here and dealt with the reasonableness of the railroad explosives rates which had been in effect prior to the rate reduction in November, 1955. The suits were initially filed by the Government in September and October, 1947. It was not until February, 1955, almost eight years later, that the Commission ruled that the pre-1955 explosives

rates were reasonable. Cf. 294 I. C. C. 5. Approval by the Commission of some of the Section 5a procedural agreements mentioned above consumed a great amount of time. This ranged from eleven months for the Western Traffic Association's agreement to two years nine months for the agreement submitted by the Southern Freight Association.[1]

The experience of the plaintiff in ACTA may also be relevant here. On pages two and three of the Memorandum of Aircoach Transport Association, Inc., et al., as amicus curiae, filed in our Court of Appeals in this cause (No. 14,562), it is stated that on April 18, 1958 the District Court in ACTA entered an order in which proceedings were to be instituted before the I. C. C. by one or more of the parties within 20 days of this date; that proceedings before the I. C. C. were commenced before it on April 22, 1958, by the filing of a petition or complaint initiating proceedings; and that the Commission has not yet acted on the issues referred to it under the District Court's order of reference.

Thus, it will be seen that it has been over eight months since proceedings were started before the Commission and as of October 31, 1958 it had not yet taken any action. Besides that, there is nothing to indicate to this court how long it will take for the Commission to render its decision in that case, and even after the Commission has rendered

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[1] *WTA—Agreement* application filed November 15, 1948; decided October 3, 1949, 276 I. C. C. 183. *Eastern Railroads [TEA] —Agreements application* filed December 7, 1948; decided March 15, 1950, 277 I. C. C. 279. *Southern Freight Association, et al— Agreements,* application filed January 5, 1949, decided October 18, 1951, 283 I. C. C. 245.

See also, *Illinois Freight Association—Agreement,* application filed April 28, 1950; decided August 17, 1951, 283 I. C. C. 17; *Southern Ports Foreign Freight Committee—Agreement,* application filed March 16, 1950; decided April 11, 1952, 284 I. C. C. 775; *Railroad Interterritorial Agreement,* application filed October 18, 1950; decided January 21, 1953, 287 I. C. C. 701.

its decision, its ruling may be appealed by one of the parties. If this happens, considerably more time will undoubtedly elapse before the Courts will be able to render a final decision in that case.

It must also be remembered that in connection with defendants' motion to suspend proceedings, it also requests that all discovery proceedings regarding the rate reduction issue be suspended until the Commission has made its ruling.

It would thus seem that a reasonable time before Commission action might well be measured in years rather than months. The Court has taken into consideration the fact that this action has been pending more than four years; that it will be many months before a trial can be had, and that it will take from four to six months to try the case. It would be contrary to sound judicial discretion to permit this additional delay to this over-postponed litigation merely to seek an optional ruling from the Commission on the rate reduction aspect, which is not the sole or dominant issue in this case.

In addition, the very nature of the other overt acts alleged reveal the great importance of early consideration of these acts on their merits as soon as practicable. The claims and counterclaims in this case indicate continuing injury to the business of the various parties. Plaintiff's request for injunctive relief should be resolved without unnecessary delay. New delay will add to the difficulty of obtaining witnesses and will further dim memories of facts essential to all parties. The extraordinary cost to all parties of this litigation would also be increased.

Thus, the Court concludes that too much delay has already taken place in the disposition of this case. In fairness to all parties, the Court deems it essential to get to the merits of the case as speedily as possible. Reference to the Commission would only serve to thwart this purpose.

II.

In addition to the joint memorandum filed on behalf of most of the railroad defendants, Atlantic Coast Line and seven other southern railroads filed a supplemental memorandum on September 29, 1958, raising questions allegedly relating to them alone. Two defendants who did not take part in the joint memorandum, namely, the Central Vermont Railway and the Grand Trunk Western Railroad Company, asked permission to file a memorandum containing their contentions with respect to the motion to suspend, and their request was granted. The questions raised by both memoranda will be considered together at this time.

The underlying contention here is that the rate reduction is clearly the dominant issue as to them and hence they, at least, should be permitted to litigate the question of anti-trust immunity under 49 U. S. C. 5b (9) before the I. C. C. The southern railroads, on page 3 of their brief, point to statements by plaintiff's counsel in connection with an earlier motion that they were neither prime movers nor principal beneficiaries of the alleged defamation conspiracy. They also cite the depositions of plaintiff's principal officers to the effect that no official was able to state of his own knowledge what specific role was played by the southern railroads in the alleged defamation campaign outside of the publication of a certain anti-truck article in one of their magazines. At page 6 of their memorandum, the southern railroad defendants concede that they also made a contribution toward the production of a film by the Farm Roads Foundation. The publication of the magazine article is set forth in the complaint as one of the overt acts done to effectuate the conspiracy and the film production has been mentioned by plaintiff in affidavits as one of the concerted methods used by defendants in connection with the alleged conspiracy. The southern railroads admit-

tedly took some part in the I. C. C. hearings in opposition to the application by Riss and other motor carriers for operating authority. As to the rate reduction, it is said at page 8 of their brief:

> "While rates in southern territory were reduced several months later, in March and April of 1956, the reductions could hardly have been intended to and did not affect the competition of Riss since Riss does not operate to any significant extent in southern territory. Thus, the supplement to the complaint does not include this later reduction in its allegations."

Thus, it is clear that southern railroads are merely urging statements of facts and inferences contrary to those made by the plaintiff in its complaint and sworn affidavits. The court is asked to divide this litigation and to refer the rate reduction issue regarding a few defendants to the I. C. C. based on conflicting assertions as to how much or how little these few defendants may be involved in the issues raised by the complaint.

Despite the conflict, there seems to be a sufficient basis in the statements of defendants alone to connect them in some degree with the activities of the other defendants. Even if the evidence should show these defendants took only a small part in the alleged conspiracy, if they did so with knowledge of the conspiracy and consented to take part in it, then they assume equal responsibility for the acts of all conspirators. As was said in **United States v. National City Lines**, 186 F. 2d 562, 571 (7th Cir. 1951):

> ". . . Nor does the circumstance that certain of the supplier defendants had requirements contracts with one but not both of the City Lines defendants absolve those defendants of participation in the conspiracy charged in the indictment or prove that no such conspiracy existed; it was not incumbent on the

> government to prove that each defendant participated in that conspiracy in all of its ramifications, for, in order that one be found guilty as a conspirator, it need only be shown that, with knowledge of the existence of the conspiracy, he knowingly performed an act designed to promote or aid in the attainment of the object of that known conspiracy."

When one enters after the inception of a continuing conspiracy, he becomes liable for the acts of all the conspirators since the conspiracy is, in effect, renewed each day of its existence. **United States v. Borden Co.**, 308 U. S. 188, 202 (1939); **United States v. N. Y. Atlantic and Pacific Tea Co.**, 137 F. 2d 459, 463 (5th Cir. 1943), cert. denied, 320 U. S. 783 (1943). A reading of the complaint reveals that plaintiff will attempt to prove the existence of an anti-trust conspiracy continuing over a period of several years. When dealing with such a charge, it is essential to consider the allegations as a whole and not to dismember it into many parts. **United States v. Patten**, 226 U. S. 525, 544 (1913).

Since, therefore, the defendants' degree of participation cannot be judged before plaintiff has presented all its evidence and since even a lesser role in a conspiracy may bring about liability equal to that of prime movers, it cannot be said that any one allegation such as the rate reduction issue is of dominant importance as to these defendants.

These considerations apply with equal force to defendants Grand Trunk Western Railroad Company and Central Vermont Railway. They urge on page 3 of their separate memorandum that the only connection with the defamation allegations which has been so far adduced is the mere "mute membership" of each petitioner in two of the rail associations named as defendants, and that, hence, the rate

reduction is the dominant issue as to them. They cite **United States v. Food and Grocery Bureau of Southern California,** 43 F. Supp. 966, 973 (S. D. Calif. 1942), to establish the principle that mere mute membership in an association charged with an unlawful criminal conspiracy will not impose liability upon a member. This would seem to be in accordance with the general principles of conspiracy law discussed above. Some degree of knowledge and consent to the conspiracy or some kind of knowing assistance given in furtherance of it is usually required to impose liability.

In their brief, these defendants simply deny any other connection with the alleged defamation conspiracy except "mute membership" in railroad associations which are defendants in the case and base this denial on certain answers to interrogatories. On page 3 of their memorandum it is said:

> ". . . Indeed, after almost four years of pleading and discovery procedures the only nexus relating the undersigned defendants to the alleged conspiracy is their membership in several railroad associations to whom Riss has imputed leadership in this supposed campaign of defamation. These two railroads were members of the Association of American Railroads and the Eastern Railroad Presidents Conference, and the Grand Trunk Western Railroad Company belonged to the Traffic Executive Association—Eastern Railroads (Central Vermont Railway, Inc., did not). However, no officer or employee of either railroad served as an officer in any of the associations."

The Court is asked to accept the above statement at this stage of the case for the purpose of granting their motion to suspend proceedings as to them and refer the rate reduction issue to the Commission apart from the disposition of the motion with respect to the other defendants.

However, this was not the question before Judge Yankwich in the **Food and Grocery** case which was particularly relied upon by defendants in this motion. That case does not stand for the proposition that allegations of membership in an association charged with a conspiracy, without more, warrants a dismissal of that party from the case before the Court has had an opportunity to hear the evidence. The statements relied upon by defendants were made by Judge Yankwich in connection with motions by various defendants to dismiss at the close of the government's case. The charges were dismissed as to some defendants after the government had presented its entire case because the Court was satisfied that the evidence had failed to establish consent to or participation in the alleged conspiracy. The Court approves of this procedure. If it appears at the end of plaintiff's case that the evidence does not adequately connect any defendant with the charges contained in the complaint, then a motion for a directed verdict as to such defendant may be entertained.

However, just as the Court could not logically dismiss defendants from the case at this point because it is not yet aware of what the evidence may show at trial, in like manner, it would not be proper to assume that these two defendants had little or no connection at all with the alleged defamation conspiracy in order to reach the conclusion that the rate reduction issue is the sole or dominant issue as to them. Besides, it is a well-settled principle of conspiracy law that a defendant may be held fully liable for the consequences of a conspiracy even though its degree of participation may turn out to have been somewhat less than that of other defendants.

The very sound judicial policy against dealing with litigation piecemeal also militates against defendants' position. Since the court could not proceed with the trial until the Interstate Commerce Commission had an oppor-

tunity to take action, unnecessary delay would result in this long-delayed case if the defendants' motion to suspend were granted.

Conclusion.

The order of this Court dated May 26, 1958, denying the motion by certain railroad defendants to suspend proceedings in this case and to refer certain issues to the Interstate Commerce Commission for determination is hereby vacated.

For the reasons set forth in the above opinion, and in conformity with the orders of the United States Court of Appeals for the District of Columbia Circuit dated August 8, 1958, and December 16, 1958, the Court makes the following rulings:

1. The motion of defendant railroads to suspend proceedings and to refer certain issues to the Interstate Commerce Commission as supported by the memorandum on behalf of all movants filed September 29, 1958, as well as by the supplemental memorandum on behalf of Atlantic Coast Line Railroad Company, et al., filed September 29, 1958, is hereby denied.

2. The motion of defendants Central Vermont Railway, Inc., and Grand Trunk Western Railroad Company to have proceedings suspended as to them is hereby denied.

Counsel for plaintiff will submit an appropriate order in accordance with this opinion.

/s/ John J. Sirica,
United States District Judge.

January 16, 1959.

[267 F. 2d 659.]

United States Court of Appeals
For the District of Columbia Circuit,
September Term, 1958.

Atlantic Coast Line Railroad Company; Atchison, Topeka and Santa Fe Railway Company, et al.,
Petitioners,
v.
Riss and Company, Inc.,
Respondent.
No. 15,019.

Before: Bazelon, Bastian, and Burger,
Circuit Judges, in Chambers.

ORDER.

This case came on for consid[illegible]tion on petitioners' motion for leave to file a petition for writ of certiorari and on the petition for writ of certiorari and said motion and petition were argued by counsel.

It appearing that the petition for writ of certiorari has been lodged with the clerk it is

Ordered by the court that the petition for writ of certiorari shall be filed.

In response to a previous petition of the same nature by the same petitioners, this court, on August 8, 1958, entered an order which, as clarified by an order entered on December 16, 1958, provided that the issue which petitioners seek to refer to the commission for initial consideration was required to be referred only if found by the District Court, in the exercise of a discretion based upon its

knowledge of the case, to be the "sole or dominant" issue in the case. In its opinion of January 16, 1959, supporting its order of January 26, 1959, the District Court concluded, inter alia, that the issue in question "is in no sense the dominant, much less the sole, issue of this litigation."

Our extraordinary jurisdiction under 28 U. S. C., § 1651 (1952), to review by common-law writs the interlocutory orders of the District Court should be exercised only in very limited and unusual circumstances. We have examined carefully the contentions made by petitioners and have concluded that, in the circumstances of this case, it would not be in the best interests of sound judicial administration to review at this stage of the litigation the District Court's decision either by writ of certiorari or by the alternatively requested amendment or clarification of our orders of August 8, 1958, and December 16, 1958.

Therefore, it is Ordered by the court that the petition for writ of certiorari, or in the alternative, the motion for clarification of our orders of August 8, 1958, and December 16, 1958, is hereby denied.

Per Curiam.

Dated: May 19, 1959.

[187 F. Supp. 306]

United States District Court
For the District of Columbia.

Riss & Company, Inc.,
Plaintiff,
v.
Association of American Railroads et al.,
Defendants.
Civil Action.
No. 4056-54.

OPINION.

This is a private antitrust action for treble damages and injunction brought by Riss & Company, a Kansas City trucking concern, against twenty-three of the nation's Class I railroads, four railroad associations and a public relations firm, Carl Byoir and Associates, Inc.[1]

Plaintiff's contention, as set forth on page one of its "Memorandum Summarizing Plaintiff's Conspiracy Proof against all Defendants", is that the defendants conspired to monopolize the transportation of ammunition and explosives for the United States Government in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. A., §§ 1, 2) by means which, if considered by themselves, are entirely lawful. Plaintiff claims that the purpose of this unlawful conspiracy was to obtain for the railroads, as a

[1] Prior opinions dealing with preliminary motions and discovery matters are reported in *Riss & Co. v. Association of W. Rys.*, 159 F. Supp. 288 (D. C. D. C. 1958); *Riss & Co. v. Association of W. Rys.*, 162 F. Supp. 69 (D. C. D. C. 1958); *Riss & Co. v. Association of Am. R. R.*, 170 F. Supp. 354 (D. C. D. C.), *cert. denied*, 267 F. 2d 659 (D. C. Cir.), *cert. denied* 28 U. S. L. Week 3111; (U. S. Oct. 12, 1959); *Riss & Co. v. Association of Am. R. R.*, 23 F. R. D. 211 (D. C. D. C. 1959); *Riss & Co. v. Association of Am. R. R.*, 24 F. R. D. 7 (D. C. D. C. 1959), *Riss & Co. v. Association of Am. R. R.*, 178 F. Supp. 438 (D. C. D. C. 1959), *cert. denied*, No. 15,476 (D. C. Cir., Mar. 7, 1960).

whole, at least 90% of the government munitions traffic, without regard to the merits of any particular railroad or group of railroads as competitors for such traffic. Plaintiff further alleges that the railroad association defendants and the public relations firm were the agents of the individual railroads in accomplishing this unlawful purpose and that the key to the participation of the individual railroads is their knowledge of the alleged unlawful design.[2]

The trial of this case began on January 5, 1960, and plaintiff has now completed the presentation of its evidence. The trial transcript numbers 11,158 pages, and the number of actual trial days totals 67. Plaintiff has introduced 283 exhibits, and the various defendants have had marked for identification 378 documents, of which 353 have been used on cross-examination. Now, after almost five months of trial, the Court has before it Motions to Dismiss or for a Directed Verdict, filed by all defendants pursuant to rules 41 and 50 of the Federal Rules of Civil Procedure.

This opinion will first consider defendants' Motions to Dismiss the Complaint. Plaintiff has offered evidence which it contends shows that certain rate reductions by the defendant railroads in the fall of 1955 and the spring of 1956 were made for the purpose of eliminating plaintiff from the business of transporting ammunition and explosives for the United States Government; i. e., that such rate reductions were overt acts pursuant to a pre-existing conspiracy to eliminate plaintiff as a railroad competitor for this traffic. In 1958, defendants moved this Court to

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[2] The opinion of this Court in *Riss & Co. v. Association of Am. R. R.*, 170 F. Supp. 354, *supra*, sets forth in detail the factual background of this case. However, plaintiff has not introduced evidence on some of the charges indicated therein; e. g., "that defendants tried to infiltrate and make use of . . . the Illinois Parent-Teachers Association" (170 F. Supp. at 358).

suspend proceedings and refer these challenged rate reductions to the Interstate Commerce Commission under the doctrine of primary jurisdiction. Defendants argued then that the intent and effect of these rate reductions, made pursuant to procedural agreements approved by the Commission, should be first considered by the Commission, so that the Court could obtain that agency's expert opinion on this issue before trial. Defendants contended that these rate reductions were immunized from the operation of the antitrust laws by virtue of 49 U. S. A. C., § 5 (b) (9). The Court denied this motion. The Court of Appeals for the District of Columbia Circuit held that such issue should be referred to the Interstate Commerce Commission if, in the opinion of the trial court, it was "the sole or dominant issue in the case." (**Atlantic Coast Line R. R. v. Riss & Co.**, 267 F. 2d 659, 660 (D. C. Cir. 1959)), and that referral was not necessarily required:

> ". . . where the agreement is only one of a considerable number of overt acts alleged and where the policy favoring referral is clearly outweighed by other factors such as the probability of undue delay. . . ." (**Atlantic Coast Line R. R. v. Riss & Co.**, 267 F. 2d 657, 658 (D. C. Cir. 1958)).

This Court, thereafter, in **Riss & Co. v. Association of Am. R. R.**, 170 F. Supp. 354, supra, found that the challenged rate practice was not the sole or dominant issue in the case, and again denied the motion to suspend. A petition for writ of certiorari was denied by the Court of Appeals for the District of Columbia Circuit (267 F. 2d 659, *supra*) and a motion for leave to file a petition for certiorari was denied by the Supreme Court (**Atlantic Coast Line R. R. v. Riss & Co.**, 28 U. S. L. Week. 3111 (U. S. Oct. 12, 1959)). In its earlier opinion in this matter, this Court found that the rate reduction practice was not the sole or dominant issue. The present motion to dismiss

is based on defendants' contention that plaintiff's evidence makes it clear that the intent and effect of the rate reductions "in reality is the 'dominant issue' " (Memorandum in Support of Motion to Dismiss or Direct Verdict for all Defendants, p. 2). The Court is not in agreement with this argument.

After almost five months of trial, the Court is convinced more than ever that the challenged rate reduction is not the "sole or dominant issue" in this case. Defendants' motions to dismiss are accordingly denied.

Defendants' Motions for Directed Verdict are based essentially on three grounds: (1) the recent decision of the Supreme Court in **Talley v. California**, 28 U. S. L. Week. 4186 (U. S. March 7, 1960); (2) lack of substantial evidence of a pre-existing conspiracy in violation of the Sherman Act; and (3) lack of substantial evidence of the causation of injury or fact of damage. These grounds will be considered in order.

In the presentation of its prima facie case, plaintiff's evidence of the alleged "pre-existing conspiracy" consisted in part of documents from which a jury could find that the defendants used the so-called non-attribution or "third-party technique" in which the author or sponsor of publicity is not disclosed. It is plaintiff's contention that such publicity methods, when done for an unlawful purpose (e. g., monopoly), are not protected by the First Amendment guarantees of freedom of speech and press (Cf: **Noerr Motor Freight v. Eastern R. R. Pres. Conf.**, 155 F. Supp. 768 (E. C. Pa. 1957), **aff'd** 273 F. 2d 218 (3rd Cir. 1959), **cert. granted**, 28 U. S. L. Week. 3307 (U. S. April 18, 1960).

In the recent **Talley** case, the Supreme Court had occasion to deal with the problem of anonymous speech. There the Court held invalid a broad municipal ordinance of the

City of Los Angeles which provided, in substance, that no handbills should be distributed which did not bear on their face the name and address of the person who caused the same to be printed, written, compiled, manufactured or distributed. Talley was convicted of distributing pamphlets of the "National Consumers Mobilization" which urged the reader to boycott certain merchants who carried products of manufacturers who did not give equal employment opportunity to certain minority groups. His conviction was reversed by the Supreme Court which, after citing examples showing that, historically, anonymous pamphlets have played an important role in the fight for freedom, proceeded to the rationale of its holding:

> "We have recently had occasion to hold . . . that there are **times and circumstances** where States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. Bates v. Little Rock, 361 U. S. . . .; N. A. A. C. P. v. Alabama, 357 U. S. 449, 462. The **reason for those holdings was that identification and fear of reprisal** might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is **subject to the same infirmity.**" (28 U. S. L. Week. at 4188. Emphasis added.)

Defendants cite **Talley** for a blanket holding that **all** anonymous publicity is thus protected by the Constitution and that therefore the publicity activities by the corporate defendants and associations complained of here are similarly protected. The Court does not agree. In **Talley** and **Little Rock**, the basis for the Supreme Court's ruling was that established fears of reprisal and intimidation might deter minority groups from peaceful discussion on matters of public interest. Such is not the situation here. The railroad defendants are among the largest corporations in the country. It certainly cannot be contended that the

railroads of the nation will be in danger of intimidation or reprisal if their identities in connection with publicity are revealed. Plaintiff's evidence could justify a jury in finding that defendants employed hostile publicity against plaintiff by means of the "third-party technique". For the reasons mentioned, this Court finds that Talley is not controlling here (See **Noerr Motor Freight v. Eastern R. R. Pres. Conf.**, 155 F. Supp. 768 (E. D. Pa. 1957), **Aff'd** 273 F. 2d 218 (3rd Cir. 1959), **cert. granted** 28 U. S. L. Week. 3307 (U. S. April 18, 1960).

Before proceeding to a consideration of defendants' contention that the record discloses a lack of substantial evidence from which a jury could find the existence of a pre-existing conspiracy and the fact of damage to plaintiff, the Court feels it would be helpful to review some of the well established principles of law relating to motions for directed verdict.

In considering defendants' motions for a directed verdict, the trial court must, of course, view the evidence and all inferences from the standpoint most favorable to the plaintiff (**Shewmaker v. Capital Transit Co.**, 143 F. 2d 142 (D. C. Cir. 1944)). However, a party is not entitled to rely on inferences which are unreasonable and the jury may not speculate (**Galloway v. United States**, 319 U. S. 372 (1943)). Regarding the quantum of evidence, it has long been the rule in the Federal Courts that a mere scintilla of evidence is insufficient to allow the case to go to the jury (**Pennsylvania R. R. v. Chamberlain**, 288 U. S. 333, 344 (1933); **Murray v. Towers**, 239 F. 2d 914 (D. C. Cir. 1956)). Substantial evidence must be present (**Baltimore & O. R. R. v. Postom**, 177 F. 2d 53 (D. C. Cir. 1949)). Where the facts are in dispute, and where fair minded men may draw different inferences from the evidence relating to them, a jury is the proper tribunal to try the issue (**Tiller v. Atlantic Coast Line R. Co.**, 318 U. S. 54

(1943); **Kendall v. Gore Properties, Inc.**, 236 F. 2d 673 (D. C. Cir. 1956); **McCoy v. Moore**, 140 F. 2d 620 (D. C. Cir. 1944)).

It is in the light of these principles that the Court will consider defendants' contention that there is not substantial evidence from which the jury could find the existence of a conspiracy to violate the antitrust laws. The Court feels in this regard that it would be impracticable and, further, that it is unnecessary to review in this opinion all the evidence presented by the plaintiff in this already voluminous record. The Court has listened attentively to all the evidence, the excellent arguments by all counsel on these motions, and has examined on more than one occasion all of the documentary evidence introduced. It is, of course, elementary in conspiracy cases of this nature that until the participation of an individual defendant has been established by competent evidence admissible against it, evidence of acts of other alleged co-conspirators will not be admitted to establish the particular defendant's participation in the alleged conspiracy (**United States v. Gypsum Co.**, 67 F. Supp. 397, 452 (D. C. D. C. 1946) **rev'd on other grounds** 333 U. S. 364 (1948); **Flintkote Co. v. Lysfjord**, 246 F. 2d 368, 87 (9th Cir.) **cert. denied** 355 U. S. 835 (1957)).[3] Mere membership in an unincorporated association, in and of itself, is, of course, not sufficient to establish participation in a conspiracy (**Phelps Dodge Refining Corp. v. FTC**, 139 F. 2d 393, 396 (2d Cir. 1943)). However, continued membership in such an association and payment of dues, with a reasonable opportunity to learn of the association's activities on behalf of its mem-

[3] Antitrust conspiracy cases are, of course, usually built on circumstantial evidence (*United States v. Morgan*, 118 F. Supp. 621, 634 (S. D. N. Y. 1953)). "Conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances" (*Bausch Machine Tool Co. v. Thompson*, 72 F. 2d 239, 241 (2d Cir.), *cert. denied* 293 U. S. 580 (1934)).

bers, are sufficient to charge the members with liability for such activities (**Metropolitan Bag & P. Dist. Ass'n v. FTC**, 240 F. 2d 341, 344 (2d Cir.), **cert. denied** 355 U. S. 819 (1957)). The individual railroad members of the associations can be held responsible for the unlawful conspiratorial acts or declarations of the associations only if they are shown to have known and approved of such activities and of their unlawful objective.[4]

On the basis of all the evidence presented, the Court feels that a jury could find that a conspiracy of the type alleged by the plaintiff did exist, with the defendant associations and the public relations firm as its principal participants. Further, the Court feels, on the basis of the evidence admitted as to each individual railroad defendant, that the jury could find that each of these defendants, though not involved in every detail of such conspiracy, had knowledge and approve of its illegal objective and the general means of carrying it out. If the evidence is such that a jury could find that a conspiracy under the antitrust laws existed, only slight evidence is necessary to connect individual conspirators with it (**United States v. Morgan**, 118 F. Supp. 621, 743-44 (S. D. N. Y. 1953)).

Defendants' third point on these Motions for Directed Verdict is that the evidence does not present sufficient proof of causation of injury or fact of damage from which the jury could find that plaintiff was injured **as a result** of any conspiracy on the part of the defendants. The Court, in the trial of this case has, in its discretion, allowed counsel for defendants considerable latitude on cross-examination, even to the extent of allowing examination on matters which might be more properly part of an affirma-

[4] Defendants agree that this is a correct statement of the law. See "Defendants' 9, 16, 21, etc., Memorandum in Support of Motion for Directed Verdict, page 9.

tive defense. The number of documents marked for identification and used by defense counsel on cross-examination totals 353. This cross-examination has placed before the jury charts and documents from which they could conclude that several factors were responsible for the loss which plaintiff alleges it suffered as a result of the alleged conspiracy. Defendants' cross-examination has attempted to develop that a number of causes other than the conduct of the defendants were responsible for the plaintiff's loss. Plaintiff's president, on cross-examination has denied that these factors were responsible for plaintiff's losses. These other influences include the end of the hostilities in Korea in 1953, the cancellation by the Interstate Commerce Commission of certain of the temporary operating rights of the plaintiff to transport ammunition and explosives, difficulties resulting from certain purchases of defective equipment by plaintiff, and certain errors in management and business judgment by plaintiff.

Judge Wyzanski, in a well-reasoned opinion in the case of **Nomand v. Universal Film Exchanges, Inc.**, 72 F. Supp. 469 (D. Mass. 1947), **aff'd** 172 F. 2d 37 (1st Cir. 1948), **cert. denied** 336 U. S. 967 (1949), a case where the evidence tended to show multiplicity of causes of injury, stated as follows:

> ". . . the loosest construction [of the Anti-trust laws] would require a plaintiff in a private Anti-trust case to bear the burden of proving that defendants' unlawful acts . . . were either a cause of a specific fraction of his losses or, at any rate, **a more substantial cause of his losses than was any other known factor.**" (72 F. Supp. at 482. Emphasis added.)

Applying this test to the evidence of damages presented by plaintiff and the evidence tending to show other causes elicited by defendants on cross-examination, the Court feels that in view of all the evidence the jury could

find that the alleged acts of defendants were "a more substantial cause" of plaintiff's loss "than was any other known factor".

Accordingly, the Motion of all Defendants for a Directed Verdict is denied. The Court does not wish to be understood as indicating that at the close of all the evidence, the plaintiff will of necessity have made a case for the jury. The Court only holds that at this stage of the evidence, the defendants are not entitled to a directed verdict. Defendants, of course, under the provisions of Rule 50, Federal Rules of Civil Procedure, may renew such motion at the close of all the evidence.

All exhibits introduced by plaintiff may now be considered by the jury as having been received in evidence as against any or all of the defendants. The jury will be instructed that they may so consider these exhibits, giving to them the weight to which they think they are entitled.

Counsel for plaintiff will prepare an appropriate order in accordance with this opinion.

John J. Sirica,
United States District Judge.

June 6, 1960.

ADMISSIONS BY RISS, READ TO THE JURY DURING TRIAL.

Mr. Ball: If the Court please, I want to read first two answers to the interrogatories that the Western Railroads served on the plaintiff in July 1958. The first is interrogatory E II 9 (a).

The interrogatory reads this way:

"Was any part of the damages claimed by Riss caused by revocation or cancellation of its interstate operating authority?

"Answer. No."

Then Interrogatory E IV 11 (a):

"Was any part of the damages claimed by Riss caused by the enforcement of statutes, ordinances, or regulations against Riss?

"Answer. No."

. . . . . .

This is Interrogatory D-(i):

"Does Riss contend that the joint conduct of activities by the defendants or any of them, in support of or in opposition to proposed ordinances or legislation, is evidence of an alleged conspiracy?

"Answer: No."

. . . . . .

Interrogatory D-14-F:

"Does Riss contend that the Association of American Railroads, the Association of Western Railroads, the Traffic Executive Association Eastern Railroads, and the Eastern Railroad Presidents Conference, or any of them, constitute an agreement, combination and conspiracy in restraint of trade?

"Answer: No."

D-14-G:

"Does Riss contend that membership in the AAR, AWR, TEAER and ERPC, or in any of them, constitutes in itself participation in an alleged conspiracy?

"Answer: No."

D-14-H:

"Does Riss contend that joint participation in proceedings before the Interstate Commerce Commission or before any other regulatory agency, or in the courts, by the defendants, or any of them, is evidence of an alleged conspiracy?

"Answer: No."

E-V-5:

"Does Riss claim that any of the defendants violated the antitrust laws by participating in MC-200 Sub-84 [Riss's application to the I. C. C. for permanent explosives authority]?

"Answer: No."

E-V-6:

"Does Riss claim that it was a violation of the antitrust laws for any defendant to solicit the participation of others in that proceeding?

"Answer: No."

F-2:

"Does Riss claim that it is a violation of law for a railroad or railroad association to attempt to interest public organizations in the activities of Riss, or of truckers, of explosives generally, or of long-distance truckers generally?

"Answer: No."

F-6:

"Does Riss contend that joint action by railroads to assert their generally common interest in opposition to the grant of operating authority in a proceeding before a regulatory agency is a violation of the antitrust laws?

"Answer: No."

G-1:

"Does Riss claim that the organization of a committee of counsel to represent a number of railroads in a proceeding before the Interstate Commerce Commission is a violation of law?

"Answer: No."

G-2:

"Does Riss claim that it is a violation of law for a railroad or an association of railroads to expend funds to publicize the activities of truckers?

"Answer: No."

G-3:

"Does Riss claim that it is unlawful for a railroad to expend funds in the preparation and presentation of evidence before the Interstate Commerce Commission in opposition to an application for increased authority by Riss?

"Answer: No."

H-11:

"Does Riss contend that the quotations of Section 22 rates of which it complains were made with the specific intent to exclude Riss alone from the business of transportation explosives?

"Answer: No."

H-13:

"Does Riss contend that each railroad defendant participating in one or more of the Section 22 rate quotations of which plaintiff complains acted with the specific intent of eliminating Riss as a competitor for explosives traffic?

"Answer: No."

H-14:

"If the answer to the preceding question is in the negative, state which if any defendants are alleged to have acted with such intent.

"Answer: None."

An admission, paragraph 4, paragraph 31:

"The elimination of Riss from the business of transporting property in interstate commerce would not result in the monopolizing of land transportation by the defendants."

Interrogatory H-37:

"Does Riss contend that participation by a defendant railroad in the establishment in a Section 22 rate

for the transportation of explosives applicable to more than one railroad, of which Riss complains, is in itself evidence of participation in the conspiracy alleged in the complaint?

"Answer: No."

II-38:

"Does Riss contend that any defendant railroad acted to establish Section 22 rates for the transportation of explosives applicable to more than one railroad, of which Riss complains, except pursuant to and in conformity with the terms of agreements validly approved by the Interstate Commerce Commission under Section 5-A of the Interstate Commerce Act?

"Answer: No."

EXCERPT FROM CLOSING ARGUMENT TO JURY BY ONE OF RESPONDENT'S COUNSEL.

[Mr. McGlothlin] Now, the final thing that I wanted to talk about is on the base year system on Meyers [Riss's expert witness on evaluation]:

Do you want to put that up there?

(A chart was placed on easel.)

You remember Mr. Meyers took as his base year '49-'50. That chart doesn't say "'49-'50," but I am coming to that.

Mr. Meyers took '49-'50.

Now, from a statistical standpoint, using two years is usually better than one year, because in any event you can iron out some of the matter.

But the one he chose, '49-'50—'50 was an abnormal year economically in the trucking business, and particularly in the explosives business, because in the middle of 1950 North Korea invaded South Korea and the United States said, "We will defend South Korea," and ammunition and

explosives started flowing from all the arsenals as fast as they could, across the United States, for shipment across the Pacific to Korea.

Now, that's trucking business, and that is abnormal.

So we said, "Mr. Meyers, do something more for us. Let's take the two peacetime years in that same range of period you are talking about."

Remember, that's the whole period. I'm still talking on his figures.

I will not take you down on that chart partly because I don't understand it.

At the bottom, however, you will see, that the constructive net income before taxes of Riss & Company, using Mr. Meyers' method, whatever it may have been, is $5,600.00.

And using the multiplication factor that he used, you get a constructive value of Riss & Company of $30,000.00.

Now, use the same factors that he did, he said that it had a minus value, I think of $40,000.00, or $45,000.00. Let's say $45,000.00, it comes out even.

Well, the difference between 30 and minus 45 is $75,000.00.

So if you used two peacetime years instead of one peacetime and one war year and you used Meyers' own method, you come out with a maximum difference off the average for all the values of $75,000.00.

INSTRUCTIONS TO THE JURY.

The Court: Ladies and gentlemen of the jury, we are now approaching what in the final analysis is the most important part of this case. After the better part of ten months of trial we have now reached the place where there are no more witnesses to be heard, no more exhibits to be read, and no further arguments by counsel.

I know that I speak for counsel on both sides when I say that your unfailing attention, your patience, and your

interest in this long and complex case should be a model for other juries.

Your responsibilities are great, but you have shown by your attitude that you are fully aware of them.

The fact that you have been selected for jury duty in such an important case as this one is a tribute to your qualifications and indicates the confidence that all counsel have reposed in you.

Your untiring efforts, and your obvious sense of duty are worthy of the greatest commendation.

Blackstone, a great jurist of England, and one whose writings were so familiar to our Founding Fathers, called the jury system the glory of the English law. It is certainly one of the splendid achievements of our Western civilization.

You have served here in the finest tradition of that system.

The Court at this time wishes also to formally extend its compliments to the able counsel on both sides for the manner in which they have conducted themselves, and to thank them for the continued cooperation which they have shown to the Court during the many days of the trial and the many conferences and proceedings prior to trial.

As you will recall, at the beginning of the case, the Court gave you a preliminary instruction in the hope that because of the nature of the case those remarks would be of assistance to you during the course of the trial.

I mentioned to you at that time and during the course of the trial that at the end of the case you would receive the Court's final instructions on the law.

These instructions that I now give you are to be your guide in applying the law to the facts. These instructions, then, are the final step before you retire to the jury room to deliberate upon the evidence in this controversy and to arrive at your verdict.

The word "verdict" has ancient and important roots in our legal system. Our English word "verdict" is com-

posed of the parts of two Latin words, "Ver" is taken from the Latin word "Veritas", meaning "the truth".

"Dict" is the root of the Latin word "dicto", meaning "to speak".

So that literally your responsibility in this case, as in any case, in returning a verdict, is to speak the truth as to the rights, responsibilities and obligations of the parties to this litigation.

After your deliberations, then, you will be called upon to speak the truth regarding your findings in this case.

You have taken an oath to try this case according to the law and the evidence. As I have told you on an earlier occasion, your responsibilities as jurors are great, as is my obligation and solemn duty in this case.

Your oath includes the words "according to the law". My duty is to acquaint you with that law.

My duty and responsibility is to instruct you as to the law that will govern you in reaching your verdict. It is your responsibility and duty under your oaths to accept this law as I shall state it to you.

You, however, are the exclusive judges of the facts, the sole power to determine the credibility of witnesses, determine who has testified to the truth, where there is some question in issue, to judge and determine the weight of the evidence, to find the facts and to apply the law thereto as it is outlined to you by the Court, and to then declare your result rests with you.

In this regard I want to make two observations to you at this time:

First of all, if during the course of these instructions I have occasion to refer to some of the evidence in the case, my recollection of the evidence is not binding on you. It is your recollection and your recollection alone which must guide you in reaching your verdict.

Secondly, as a matter of explanation, I want to say to you that the Judges of the Federal Courts have a right

under the law to comment on the evidence. This means that the Judge in the course of his instructions to the jury may take the testimony of the individual witnesses, may discuss the testimony pro and con, and may say to you, "I believe this witness," or "I do not believe him;" "I believe this much of his testimony, I don't believe the rest," or can make whatever comment he sees fit upon the evidence.

This power of a Federal Judge is subject only to the qualification that the Judge must say on the record the magic words, "Of course, my views are not binding upon you."

However, it does seem to me that if a Judge is entitled to any respect in the courtroom, the comments he makes from the bench in giving his instruction must have some effect upon the jury. Consequently, I do not believe that a Judge can comment upon the evidence and then say, "Of course, my comments are not binding upon you" without having his remarks on the evidence affect the jury in some way.

As a matter of practice, then, this Court, at least, does not comment upon the evidence.

It is for you alone to determine, under the Court's instructions, what witnesses are worthy of belief and what facts have been established or have not been established.

Therefore, if the Court has said or done anything during this trial which has suggested or indicated to you that it is inclined to favor the claims or position of any party, I instruct you to disregard it.

I have not expressed or intimated any opinion to you as to what witnesses are worthy of belief or disbelief; what facts are established, or which facts have not been established; or what inferences should be drawn from the evidence.

Before instructing you on the law as specifically applied to this case, and reviewing for you some of the evidence,

I will now comment on some general principles of law which you should apply in your deliberations on the specific facts in this case:

First, all these instructions I give you should be considered as a whole. If in them any rule, direction, or idea be stated in varying ways, no emphasis therein is intended by me and none must be inferred by you.

For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

You are not bound to accept or to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number of witnesses or other evidence which appeals to your mind with more convincing force.

In other words, you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing side.

The final test is not in the relative number of witnesses, but in the relative convincing force of the evidence which may be offered in support of or against any particular proposition.

In this regard you are instructed that the testimony of one witness whom you find is entitled to full faith and credit is sufficient for the proof of any fact and can justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if upon the whole case, and considering the credibility of the witnesses, as I will explain that phrase to you, and after weighing the various factors in evidence, you should decide that there was a balance or probability pointing to the accuracy and honesty of that one witness.

As I mentioned earlier, you are the sole judges of the credibility of the witnesses. This means that you must determine which witnesses you are going to believe and to what extent you are going to believe them.

Now, in determining how much credibility or how much weight you are going to give to the testimony of the witnesses, you should consider the demeanor of the witness when testifying; that is, his manner while testifying, whether he impresses you as having an accurate recollection and memory of the facts about which he is testifying; whether he impresses you as a truth-telling individual; whether he manifests any bias or prejudice, or favor towards one side or the other in the case, and whether he has any interest in the outcome of the case.

In determining the weight to be given the testimony of any witness you have the right to draw upon the experience of your own lives, the common sense you have gained in the conduct of your own affairs, and all other factors that may appear important to you in determining whether a person is telling the truth or telling a falsehood.

If you believe that any witness wilfully has testified falsely as to any material fact concerning which that witness could not have been reasonably mistaken, then the jury are at liberty, if you see fit to do so, to disregard any part of the testimony of that witness, or the entire testimony of that witness.

As I mentioned to you in my preliminary remarks, the statements and arguments of counsel are not evidence in the case. It is your recollection alone of what the various witnesses testified to and what the various documents and exhibits admitted into evidence contained, that must guide and govern you in reaching your verdict.

During the course of the trial you have heard the attorneys representing the various parties making objections, and on occasion giving the reasons for their objections. The Court made rulings on these objections. You should not be concerned with such rulings or the reasons for them.

Whether offered evidence is admissible for your consideration or not is purely a question of law. No inference should be drawn from these various rulings by the Court.

You are not to consider the number or type of objections as evidence against any party.

Further, when admitting evidence to which an objection has been made, the Court, as you have so often been told, is not ruling on the weight to be given to that evidence. The question of weight is solely for the jury to determine.

When the Court has sustained an objection to a question that withdraws from your consideration that question. You should not under any circumstances speculate as to what the answer might have been.

Also, as I told you at the beginning of the trial, you should not draw any favorable or unfavorable inferences for or against any party from bench conferences which the Court has had from time to time with the various counsel, or from the fact that occasionally during the course of the trial the Court has requested that you retire to the jury room.

You, again, should not speculate as to what was said during these conferences.

Remember, also, that the questions which were propounded to the witnesses by the various attorneys are not to be considered as evidence. Only the answers given by the witnesses are the evidence.

The plaintiff in this case, by filing its complaint against the defendants, has assumed the burden of proving its allegations by a fair preponderance of the evidence, which, however, is not necessarily determined by the greater number of witnesses testifying to a particular set of facts.

This phrase "preponderance of the evidence," means such evidence as, when weighed with that opposed to it, has the more convincing force.

Actually, this phrase is a legal one which is really easier to illustrate than it is to define. To explain to you the meaning, the significance of this phrase "fair preponderance of the evidence," I ask you to visualize when you go into the jury room that you have on the table there a scale on which two trays are hanging evenly in balance.

Now, label the right hand tray the plaintiff's tray. Then put into that tray all of the evidence in the case which you feel favors the plaintiff's case; giving to that evidence the weight that you believe it is entitled to.

Then place on the defendant's tray all of the evidence in the case that favors the defendant's side of the case, again giving to the evidence the weight that you believe it is entitled to receive.

If the plaintiff's tray goes down, in other words, if the plaintiff's evidence outweighs the defendant's evidence, then the plaintiff has sustained the burden of proof by a preponderance of the evidence, and your verdict should be for the plaintiff against that defendant.

But if the defendant's tray goes down, that is, if that defendant's outweighs the plaintiff's, then your verdict should be for that defendant.

Now, if the trays remain in equal balance upon all of the issues in the case, upon which the plaintiff has the burden of proof, then your verdict must be for the defendant because, if the evidence weighs the same for both sides, the plaintiff has not sustained the burden of proof by a preponderance of the evidence.

In this regard, plaintiff's claim must be judged separately as to each defendant, and the position of each defendant must be judged on its own merits.

Each defendant, therefore, is entitled to individual consideration of the particular evidence applicable to it to determine whether that particular defendant participated in any conspiracy.

You cannot return a verdict against any defendant unless you find specifically that the defendant conspired with one or more of the other defendants to unreasonably restrain trade or to monopolize, or to attempt to monopolize explosives and ammunition traffic.

Now, to summarize on this matter of burden of proof, a party has succeeded in carrying the burden of proof on an

issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes you, the jurors, to believe that on that issue the probability of truth favors that party.

Now, what is this case all about?

Plaintiff, Riss & Company, Inc., is a corporation with its principal offices in Kansas City, Missouri, and is engaged in the transportation of property by motor carrier in interstate commerce. That is, among and between the various States. Plaintiff is a common carrier, which means that the plaintiff company is required under the law to make its services available to any shipper complying with the law.

The defendants in this civil anti-trust suit are four railroad associations: The Association of American Railroads, The Association of Western Railways, and Traffic Executive Association—Eastern Railroads, and the Eastern Railroad Presidents Conference; one public relations firm, namely, Carl Byoir and Associates, Incorporated, with offices in New York City, and twenty-three railroads.

Fifteen of the railroad defendants have all or the preponderance of their trackage located in Western Territory. They are:

(1) The Atchison, Topeka and Santa Fe Railway Company, which has sometimes been referred to as the "Santa Fe."

(2) Chicago, Burlington & Quincy Railroad Company, which has sometimes been referred to as the "Burlington."

(3) Chicago and Northwestern Railway Company, which has sometimes been referred to as the "Northwestern."

(4) Chicago, Milwaukee, St. Paul & Pacific Railroad Company, which has sometimes been referred to as the "Milwaukee."

(5) Chicago, Rock Island & Pacific Railroad Company, which has sometimes been referred to as the "Rock Island."

(6) Great Northern Railway Company, which has sometimes been referred to as the "Great Northern."

(7) Illinois Central Railroad Company, which has sometimes been referred to as the "Illinois Central."

(8) Missouri-Kansas-Texas Railroad Company, which has sometimes been referred to as the "Katy."

(9) Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, which has sometimes been referred to as the "Soo."

(10) Missouri Pacific Railroad Company, which has sometimes been referred to as the "Missouri Pacific."

(11) Northern Pacific Railway Company, which has sometimes been referred to as the "Northern Pacific."

(12) St. Louis-San Francisco Railway Company, which has sometimes been referred to as the "Frisco."

(13) Southern Pacific Company, which has sometimes been referred to as the "Southern Pacific."

(14) Union Pacific Railroad Company, which has sometimes been referred to as the "Union Pacific."

(15) Wabash Railroad Company, which has sometimes been referred to as the "Wabash."

Five of the railroad defendants have all or the *preponderance* of their trackage located in Eastern Territory. They are:

(1) Baltimore & Ohio Railroad Company, sometimes referred to as the "B. & O."

(2) The Chesapeake & Ohio Railway Company, sometimes referred to as the "C. & O."

(3) Erie Railroad Company, sometimes referred to as the "Erie."

(4) The New York Central Railroad Company, sometimes referred to as the "New York Central."

(5) The Pennsylvania Railroad Company, sometimes referred to as the "Pennsylvania."

Three of the railroad defendants have all or the preponderance of their trackage located in Southern Territory. They are:

(1) Atlantic Coast Line Railroad Company, sometimes referred to as the "Coast Line."

(2) Seaboard Air Line Railroad Company, sometimes referred to as the "Seaboard."

(3) Southern Railway Company, sometimes referred to as the "Southern."

The defendant Association of American Railroads, which has sometimes been referred to as "AAR," is an unincorporated Association which in 1954 numbered among its members some 131 railroads, among whom were all of the railroad defendants in this case. It is a lawful organization and mere membership by a railroad defendant in AAR is not in and of itself evidence of participation in the alleged conspiracy.

The defendant Association of Western Railway, which has sometimes been referred to as the "AWR", is an unincorporated association which in 1955 numbered among its members some 64 Western railroads. The only defendants which are members of AWR are the 15 Western railroad defendants, and none of the 5 Eastern railroad defendants nor the three Southern railroad defendants are members. It is a lawful organization and mere membership by a railroad defendant in AWR is not in and of itself evidence of participation in the alleged conspiracy.

The defendant Eastern Railroad Presidents Conference, which has sometimes been referred to as "ERPC", is an unincorporated Association which in 1954 was composed of the Presidents of some 37 Eastern railroads, five of which are defendants in this action. Those five are the five Eastern railroad defendants, and none of the 15 Western railroad defendants or the three Southern railroad defendants, or their Presidents, are members of ERPC. It is a lawful organization and mere membership by the President of a railroad defendant in ERPC is not in and of itself evidence of participation in the alleged conspiracy.

The defendant Traffic Executive Association—Eastern Railroads, which has sometimes been referred to as "TEA" or "TEA-ER," is a railroad rate bureau which in 1954 numbered among its members some 29 railroads that operate either wholly or partially in Eastern Territory. The five Eastern railroad defendants are members of TEA. TEA operates pursuant to an agreement, introduced in evidence as TEA Exhibit 5053, which was approved by the Interstate Commerce Commission. That agreement defines the functions and procedures of the Association, and describes the duties and authority of the Chairman and other officers of the Association. In essence, TEA provides a means whereby railroads operating within Eastern Territory can engage in joint rate-making activities required or authorized by the Interstate Commerce Act. TEA is a lawful organization and mere membership by a railroad defendant in TEA is not in and of itself evidence of participation in the alleged conspiracy.

Defendant Carl Byoir and Associates, which has sometimes been referred to as Byoir, is a corporation engaged in public relations activities on behalf of many clients. It entered into a contract with defendant Eastern Railroads Presidents Conference on August 15, 1949, to perform certain services for ERPC. This contract is Plaintiff's Exhibit 49.

You will notice that the plaintiff is a corporation and defendants are all either corporations or associations. You should remember that for purposes of this case, a corporation is a person. Since it is not a person in the physical sense of the word, but only in the eyes of the law, it can only act through human beings; that is, through its officers, agents, employees or servants, and the acts or declarations of those persons when done within the scope of their employment are deemed to be the acts or declarations of the corporation. Also, of course, associations can act only through their employees and officers. It is important for you to bear in mind that not everything that is done in the name of a corporation or association, or by an officer or employer thereof, can properly be taken as an act of the corporation or association. Before you can find against any corporation or association on the basis of the acts or statements of its employees or officers, you must be satisfied that plaintiff has proved, with respect to each act upon which it relies, that the corporation or association authorized or ratified what the agent did or said. This authorization or ratification, however, does not have to be express, but may be implied or inferred from things done or said or not said, and from the circumstances.

Some of the defendants in this case are associations—associations of railroads or of their officers or employees. Such associations are perfectly lawful. Moreover, there is absolutely nothing unlawful in and of itself in any of the railroad defendants being members of one or many associations, or participating in their committees, their meetings or their other activities.

The individual members of the association can be held responsible for the unlawful conspiratorial acts or declarations of the associations only if they are shown to have known and approved of such activities and their unlawful objective, either expressly or impliedly, and of course, I do not suggest that the association did or did not engage in unlawful conspiratorial acts or declarations.

Evidence of participation by some members of an association in an illegal conspiracy is not sufficient to establish participation by the Association or other members of the Association in the conspiracy. The Association is not liable for the acts of its members unless the Association, as such, has directed or authorized the acts complained of or ratified them, either expressly or impliedly.

In regard to this situation of all parties being either corporations or associations, I wish to submit to you a caution which perhaps is not necessary, but in view of the very large sums of money which have been mentioned in the case, may bear mentioning. You will remember that on the examination on your voir dire, when you were being selected as jurors, that you were asked whether the fact that many large corporations were involved in this case would influence your verdict, and you all answered that it would not. You were also asked whether the presence of many defendants and only a single plaintiff would influence your verdict, and again you answered that it would not. Except for a limited purpose, which I will explain later, you should have no concern with the fact that large assets, property holdings and earning power have been mentioned in this case, and you should entertain no bias or prejudice against any party on that account. This Court and this jury must render equal justice to all. Remember that everyone is equal in the eyes of the law. This is a legal proceeding and you must not permit either sympathy or prejudice to affect your verdict in any way. You are instructed that no inference unfavorable to defendants is to be drawn from the mere fact that this suit has been brought by one plaintiff against several defendants. Further, you are instructed that no significance should be attached to cooperation of counsel for defendants during the course of the trial. That practice is quite normal in cases involving multiple parties on both sides.

Now, before I review some of the evidence in this case, I will state to you in an abstract way, the law applicable

to this case. However, when I said that I would review the evidence, I did not mean that I was going to attempt to go into detail and specifically review all the evidence. You have already heard the arguments of counsel for both sides, each explaining his theory in regard to the evidence. To review it in detail at this time would be a repetition which would serve no useful purpose. Therefore, my later review of the evidence will be a general reference only to it, in the hope that it will be of some assistance to you in clarifying and perhaps simplifying the issues and clarifying the application of the law.

Plaintiff's action is brought under Section Four of the Clayton Act which was passed by Congress in 1914. This Section of the Act allows a private person, or a corporation such as the plaintiff, alleging injury as a result of another's violation of the anti-trust laws, to bring a private suit for damages. As I indicated to you in my preliminary remarks, the person or corporation seeking damages must establish that he, or it, has suffered money damage as a result of the other's wrongdoing.

Plaintiff's complaint alleges that defendants violated Sections one and two of the Sherman Antitrust Act. Section One of that Act reads as follows:

> "Every contract, combination in the form of trust or otherwise; or conspiracy in restraint of trade or commerce among the several States or with foreign nations is declared to be illegal."

Section Two of the Act provides that it is unlawful for "(any) person (to) monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations."

As I have mentioned earlier, the words "person" or "persons" as used in the Act include corporations and associations organized and existing under authority of law

Plaintiff contends that the evidence shows the same means were used to violate both sections of the Act; that is, that the same methods were used in the alleged conspiracy in restraint of trade under Section One, as were used in the alleged conspiracy to monopolize and attempt to monopolize under Section Two.

A few general comments on the antitrust law, along the lines that I mentioned in my preliminary remarks, may aid you in your deliberations in this case. The Sherman Act was made law by our Congress in the year 1890 and, as you have probably noticed, is couched in very broad and general language. This general language has been construed by the Supreme Court as prohibiting only unreasonable restraints and not all possible restraints of trade. Now, what were the purposes of Congress in passing this Act, which has been called a "Charter of Freedom?"

It was the feeling of the Congress that the public interest is best served when commerce and trade are left unfettered by combinations and agreements which have the effect of destroying competition in whole or in part. Therefore, the broad purpose of the Act is to maintain free competition in interstate commerce.

Thus the Act broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. Any concerted action, therefore, by any combination of men or corporations or associations to cause, or which in fact does cause, direct and undue restraint in such commerce, falls within the prohibition of the Act and is unlawful.

As I told you on a prior occasion, the term "monopolize," as used in the Sherman Act, means the joint acquisition or maintenance by the members of a conspiracy, formed for that purpose, of the power to control and dominate trade and commerce in a commodity or commodities, or in a business to such an extent that they are

able, as a group, to exclude actual or potential competitors from the field accompanied by the intention and the purpose to exercise such power. Since the transportation of government ammunition and explosives has not been monopolized, plaintiff must prove that some or all of the defendants attempted to monopolize that business pursuant to a conspiracy to monopolize the business. The phrase "attempt to monopolize, means the employment of methods, means and practices, which, if successful, accomplish monopolization and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which means and methods are so employed by the members of, and pursuant to, a combination or conspiracy formed for the purpose of such accomplishment.

This offense of an attempt to monopolize requires proof that the parties to the alleged conspiracy had an actual, specific intent to obtain for themselves a monopoly of the relevant market by means of the overt acts engaged in by them pursuant to the alleged conspiracy.

Section One of the Act does not forbid all restraints of trade, but only combinations and conspiracies which unreasonably restrain trade. You see, all business action affects trade in some way. The law tries to keep the process natural and reasonable. Let me give you an example. When a person goes out of business because he is incompetent; that is, he just isn't a good businessman, competition is lessened naturally and obviously, since, of course, there is one less business in the field of competition. But no one is held responsible for that man's business failure. It was the result of the 'competitive' process. But when you combine and conspire to drive a competitor out of a business, and commit acts to effect that result, that is another thing. The result is the same in both cases, that is, there is one less business in the field. But in the latter case the restraint of trade, especially when part of a larger scheme to monopolize, violates the Sherman Act.

So, therefore, you see that there are three offenses charged by the plaintiff:

One, that the railroads tried to eliminate Riss as an explosives trucker in unreasonable restraint of trade, as one of their principal competitors in that field, and as part of their plan to monopolize the ammunition business for the government;

Two, that the defendants conspired to monopolize this trade for themselves; and

Three, that they then attempted to monopolize this business.

I, of course, intimate no opinion on whether or not these allegations are in fact correct. That is for you alone, the jury, to decide.

Thus you see that an essential element of the violations charged by the plaintiff in its complaint is a combination or conspiracy by the defendants.

These terms, "combination" and "conspiracy," as used in the Sherman Act have the same legal effect. I shall use them in these instructions interchangeably without intending any distinction in their meaning.

As I told you in my remarks at the start of the trial, a conspiracy is an agreement between two or more persons to accomplish a lawful objective by unlawful means, or to accomplish an unlawful objective by lawful means. No formal agreement is necessary to constitute a conspiracy.

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum

of the acts which are relied upon to effectuate the conspiracy which the statute forbids they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. The essential combination or conpiracy may be found in a course of dealings or other circumstances as well as in an exchange of words."

Now, a conspiracy may be proved by circumstantial evidence; that is, it is not necessary that there be direct evidence of the conspiracy, but it may be inferred from the things actually done and from the circumstances.

Let me read you over this definition.

As I told you in my remarks at the start of the trial, a conspiracy is an agreement between two or more persons to accomplish a lawful objective by unlawful means or to accomplish an unlawful objective by lawful means.

There are two kinds of evidence in the law. One we call "direct" and the other we call "indirect" or "circumstantial." Direct evidence is evidence presented by someone who has personal knowledge of a fact in issue in the case—the testimony of the witness himself as to what he saw or heard.

Circumstantial evidence is evidence presented by someone who does not have actual knowledge of a fact in issue but who does have personal knowledge of certain other facts which tend to prove or disprove the fact in issue.

Direct evidence is evidence which, if believed, proves the existence of a fact in issue without any inference or presumption. While circumstantial evidence does not directly prove the existence of a fact in issue, but gives rise to a reasonable inference that such facts exist.

To illustrate the difference between direct and circumstantial evidence, let us assume that the fact in issue in a case is whether or not John shot and killed Mary. If a witness testified that he personally saw John shoot Mary, we would say that we had direct evidence. On the other

hand, if a witness testified that an hour before Mary was shot, he sold John the pistol which has been identified as the murder weapon, and it was found in the possession of John shortly after the murder, we would say that we had circumstantial evidence of the fact that John did shoot and kill Mary. This rule of admitting circumstantial evidence is one of necessity and justice. Justice would seldom be done if direct or eyewitness testimony were required exclusively. At times, in fact, if the circumstantial evidence is sufficiently strong, it may be even more convincing than direct evidence, for example, an eyewitness may make a mistake in identifying the person whom he saw, or a witness' memory may be inaccurate. On the other hand, circumstances speak for themselves, and if they are strong enough and unambiguous enough at times irresistably lead to a definite conclusion.

Persons entering into such illegal relationships usually, and perhaps naturally, seek to conceal their plans and their purposes. Hence the law recognizes that the acts of the parties, their courses of conduct and all surrounding conditions and circumstances are competent as evidence upon the question and may be considered upon the question of whether or not such an illegal conspiracy or combination was made or entered into and in determining the parties to it.

To constitute an illegal conspiracy, it is not necessary that the parties thereto meet together at the same time, or at the same place, or even that they meet at all, nor is it necessary that all parties be present or participate in every act committed for the accomplishment or furtherance of the objects of the conspiracy. Nothing more is essential than that some character or manner of communication take place between them sufficient to enable them to reach a definite, mutual understanding of the common, unlawful objective or purpose to be thereafter accomplished and that they will unite or combine their efforts to that end.

Further, an unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators. It is enough that knowing that concerted action was contemplated, the conspirators gave their adherence to the scheme and participated in it. Before a conspiracy can be said to have been proved by circumstantial evidence alone, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such conspiracy, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from circumstances proved by the evidence, one consistent with the existence of the conspiracy sought to be proved and the other inconsistent therewith, you should not infer the existence of the conspiracy from such circumstances alone.

Plaintiff's claim must be judged separately as to each defendant, and the position of each defendant must be judged on its own merits. Each defendant, therefore, is entitled to individual consideration of the particular evidence applicable to it to determine whether that particular defendant participated in any conspiracy. You cannot return a verdict against any defendant unless you find specifically that that defendant conspired with one or more of the other defendants to unreasonably restrain trade by eliminating Riss from the explosives business, or to monopolize explosives and ammunition traffic, or attempt to monopolize such traffic.

If you should determine that there was such a conspiracy to unreasonably restrain trade or to monopolize the business of hauling explosives and ammunition for the government, or an attempt to monopolize, then in order for you to find that any individual defendant participated in that conspiracy, it must be shown that said defendant had "knowledge of the existence of that conspiracy" and that it knowingly performed an act designed to promote

or aid in the attainment of the object of that known conspiracy.

In order to find that a defendant had knowledge of the conspiracy, if any, the evidence of knowledge must be clear and not equivocal.

I instruct you that you may not find that any individual defendant participated in the alleged conspiracy by performing an act in furtherance of and with knowledge of the conspiracy unless you find that it had such knowledge and took such action prior to September 22, 1954.

If you should determine that there was such a conspiracy, recovery against any individual defendant can be had only for conduct which "the conspiracy contemplated and embraced." . . . A defendant is chargeable with the acts of its fellow defendants only if the acts are done in the furtherance of the joint venture as all understood it; an individual defendant cannot be held for what some of the defendants, unknown to the rest, do beyond the reasonable intendment of the common understanding.

If you should determine that there was a conspiracy, you cannot find a defendant liable for the acts of his co-defendants which were not contemplated by their common understanding. If a defendant's co-defendant enters into unlawful undertakings with third parties, said defendant is not liable for acts performed by such co-defendant in furtherance of that latter conspiracy.

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it."

Further, a defendant does not become a party to a conspiracy merely by rendering services to it. As I have mentioned before, you cannot return a verdict against a particular defendant unless you find that defendant knew of

the conspiracy and participated in it. However, this knowledge may be inferred from all the evidence and may not be proven by direct evidence. This knowledge issue is, of course, for you, the jury, to decide.

Also, a conspiracy cannot be inferred merely from the fact that several persons engage in similar business conduct with the same end in view. Such similar or parallel business behavior standing alone does not constitute a Sherman Act offense. It is, of course, one type of relevant evidence on that point. But proof of agreement, express or implied, is still indispensable to the establishment of a conspiracy under the anti-trust laws.

You must keep in mind that the character and effect of a conspiracy cannot be judged by reviewing its separate parts, but only by looking at it as a whole.

Now we will take a 15 minute recess at this time.

The Deputy Marshal: This Honorable Court stands recessed for 15 minutes.

(Short recess, at 2:20 o'clock p. m.)

The Court: I just learned that I inadvertently used in part of my charge the word "may" instead of the word "need"; n-e-e-d. So I will read over that part of the charge.

> "As I have mentioned before, you can not return a verdict against a particular defendant unless you find that that defendant knew of the conspiracy and participated in it.
>
> "However, this knowledge may be inferred from all the evidence and need not be proven by direct evidence. This knowledge issue is, of course, for you the jury to decide."

Now, what is this case all about? What is the basic issue here? The plaintiff has charged that the defendant combined to monopolize the business of transporting ammuni-

tion and explosives for the United States Government. Plaintiff claims that its explosives trucking business was a special target of the defendants' alleged campaign because plaintiff was an important trucker of ammunition and explosives for the United States Government and alleges that the Defendants would have to eliminate the plaintiff's competition for that traffic in order to monopolize that traffic. Each defendant denies these allegations of the Plaintiff.

Plaintiff concedes that the Defendants used means, which, if considered by themselves, were entirely lawful. That is, the Plaintiff is charging that type of conspiracy which I told you consisted of an agreement by two or more persons to accomplish an unlawful objective by lawful means. It is Plaintiff's contention that this unlawful objective was the obtaining for the railroads as a whole, at least 90 per cent of the Government ammunition traffic, without regard to the merits of any particular railroad or group of railroads, as competitors for such traffic.

Plaintiff contends that this alleged unlawful conspiracy had its beginning around the year 1950, and that the Railroad Association Defendants and Defendant Carl Byoir and Associates, Incorporated, the Public Relations Firm, were the agents of the individual railroad defendants in carrying out the alleged unlawful design. This, of course, is for you the jury to decide. In order for you to consider the allegations made and the evidence presented on them, it would be well to review what the record shows concerning the background of this controversy.

You will recall hearing testimony which neither side has any disagreement with that, during the period embracing the second World War, the railroads of the nation had approximately 90 per cent or more of the business of hauling explosives for the United States Government. After the war the trucking industry began to grow at a rapid rate. Evidence relating to the competitive situation

at this time is permitted and competent under the law merely for the purpose of throwing light, if it does throw any light, in your opinion, upon subsequent events. This is true also regarding the evidence relating to the so-called Reparations Cases, which concerned rates which were charged by the railroads during the Second World War. This historical evidence is admitted for your consideration—you are the judges as to whether these matters throw any light upon the acts alleged here and aid you in any way in interpreting them and understanding them.

In its original complaint filed in September, 1954, the Plaintiff alleged the use of several means by Defendants pursuant to what has been termed throughout this trial, the "pre-existing conspiracy". Plaintiff contended, as you will recall, that Defendant Eastern Railroad Presidents Conference hired a public relations firm to conduct an allegedly false and malicious campaign of publicity against long distance truck carriers of ammunition and explosives, the alleged purpose of such campaign being—as I have previously indicated—the obtaining for the railroads of at least 90 per cent of that business. It is Plaintiff's further contention that the Defendants tried unsuccessfully to get certain state legislatures to pass laws which would prevent all truckers from competing for the Government ammunition and explosives business. You will recall, in this regard, the testimony pro and con concerning the so-called "5,000 Pound Bills". Plaintiff claims that Defendants abused the right of intervention before the Interstate Commerce Commission and that both the attempts at legislation and certain proceedings before the Interstate Commerce Commission were used as a basis for a public relations campaign which was intended to injure the Plaintiff's good will and ultimately to eliminate the Plaintiff from transporting any commodities, not just explosives, in competition with the railroad defendants. Plaintiff asserts that its explosives business was a-

special target of this alleged campaign of the Defendants because Plaintiff was an important trucker of ammunition and explosives for the United States Government, and that Defendants would have to eliminate the Plaintiff's competition for the traffic in order to monopolize it.

Defendants deny all of these charges, and in response to them defendants claim in regard to their alleged preparation, circulation and publication of statements concerning the Plaintiff and other truckers, that these statements were, in fact, true and fair comments on matters of public interest, and were not part of any conspiracy to monopolize. Further, some Defendants deny any participation in such activities.

In this regard, I might tell you that the hauling of explosives by truck or rail is a matter of public interest. Defendants claim that for many years Plaintiff failed to render adequate service as a common carrier, and that the Plaintiff has on many occasions violated Federal and State laws and regulations relating to motor carriers, and has conducted its operations with inadequate, unsafe and improper equipment; has disregarded the safety and welfare of other users of the public highways, and the safety and welfare of the communities through which its trucks passed.

In regard to the evidence relating to certain violations of State and Federal laws by Plaintiff Company, the evidence on these matters may be considered by you in your determination of Defendants' intent. However, you should keep in mind that the existence of such violations is not a defense to the plaintiff's charge that the Defendants have violated the antitrust laws by conspiring to eliminate the Plaintiff from competing with them or to monopolize the business in which Plaintiff was offering such competition. Evidence of such violations has been admitted only for the purpose of permitting the fullest exploration of the Defendants' purpose and intent.

If you find that two or more Defendants did, in fact, conspire to eliminate Plaintiff's competition in, or to monopolize the business of transporting explosives for the Government, then a belief by those defendants, no matter how sincerely held, that they were thereby acting in the public interest would not legalize such a conspiracy or immunize Defendants against liability.

I do not, of course, intimate in giving this or any other instruction, any opinion as to whether the evidence has established that there was or was not such a conspiracy. Those Defendants that intervened allege that their intervention in certain proceedings before regulatory bodies involving the Plaintiff have been the reasonable, ordinary and necessary result of these alleged unlawful activities of the Plaintiff.

It is the further contention of the Defendants that when governmental bodies and other public organizations intervened or participated in proceedings before the Interstate Commerce Commission involving the Plaintiff, that such intervention was not the result of any unlawful activities on the part of the Defendants; but was, instead, the result of an independent decision on the part of each such organization that such action was necessary by reason of their respective interests and Plaintiff's alleged unlawful and improper activities. Defendants claim that any action taken by courts or administrative agencies against the Plaintiff was based on good and reasonable cause and was not the proximate result of any action of the Defendants.

Both parties, as you have heard from the arguments of counsel, claim that their evidence shows these views. This is, of course, for you to decide. The issue in this case is not whether transporting ammunition and explosives by truck is more dangerous than transporting the same by rail or whether you believe that transporting ammunition by truck is more dangerous than by rail, or whether the trucks break up the roads or whether you believe that

they break up the roads, or whether the trucks pay their fair share of the upkeep of the roads, or whether you believe or do not believe that they pay their fair share of road upkeep.

Evidence on these matters has been introduced as bearing on the issue of purpose and intent: that is, were the railroads as they claim, acting in the railroads' own interest or in the public interest in publicizing these matters, or was their intent to monopolize the transportation of ammunition and explosives for themselves, or to unreasonably restrain trade and drive the Plaintiff out of the explosives business?

Public relations activities, as I have told you during the trial, in and of themselves, are not unlawful but they cannot be used to violate the antitrust laws and I do not suggest that they were or were not so used. That, again, is for you, the jury, to decide from all the evidence. It has never been deemed an abridgement of speech or press to make a course of conduct illegal merely because the conduct was in fact initiated, evidenced or carried out by means of language either spoken, written or printed. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible to enforce laws against agreements in restraint of trade.

Further, you are instructed that sponsoring legislation, in and of itself, is not unlawful. Therefore, if you find that the Defendants or any of them engaged in an effort to obtain the enactment of any 5,000 pound bills which were introduced in various state legislatures, such action was not in itself unlawful. However, if done pursuant to a pre-existing conspiracy to drive a competitor out of the explosives business, or to monopolize or to attempt to monopolize such business, such activities, in view of the over-all plan, if there was such a plan, would violate the antitrust laws. These issues are for you, the jury alone to decide.

With regard to that part of the case dealing with proceedings before the Interstate Commerce Commission and other regulatory agencies and bodies, it is necessary, for a proper understanding of that aspect of the case, to go into some detail. First of all, I want you to keep firmly in mind that you are to take the decisions of the Interstate Commerce Commission as correct as a matter of fact and law and you should not consider whether some other result would have been proper or more desirable in these proceedings. The Commission is charged by Congress with the power and authority to regulate transportation, and the decisions of the Commission are entitled to complete acceptance by the jury.

You are further instructed that the regulatory scheme established by the Interstate Commerce Act contemplates that interested carriers may intervene in proceedings involving their competitors, and may contend in those proceedings that no new authority should be granted to their competitors. It is uncontroverted that some of the Defendants participated in or intervened in proceedings before the Interstate Commerce Commission involving the Plaintiff, but this participation or intervention, in and of itself, whether it be joint or single, is lawful under the Antitrust Laws. Intervention in these proceedings and advocacy of limitations on a competitor's operating authority are proper, legal and desirable in and of themselves, and cannot constitute evidence, by themselves, of an intention to monopolize. In other words, from the act alone of intervention or participation in these proceedings, you cannot infer the existence of a conspiracy to violate the antitrust laws. The purpose and intent of these defendants is the key issue in this case, and such purpose cannot be inferred from these acts standing by themselves. You cannot find such purpose from the mere fact of intervention or participation. Your initial determination is whether or not there was this "pre-existing conspiracy" to violate the antitrust laws.

Sponsoring legislation, in and of itself, is not unlawful. Persuasion of, or attempts to persuade, departments of the Government, by itself, is not evidence of an unlawful intent under the Sherman Act. However, if—and I say "if"—the motivation of attempts to persuade or persuasion of a department of the Government emanates from and is a part of a pre-existing conspiracy or scheme to wreck a competitor or to monopolize trade and commerce, such action is a violation of the Sherman Act.

These same principles also apply to the solicitation of witnesses or testimony of witnesses in Interstate Commerce proceedings. Such action, standing by itself, is not in any sense a violation of the antitrust laws.

Now, these Interstate Commerce Commission proceedings involved in this case and concerning which you have heard evidence are as follows: Docket MC—meaning "Motor Carrier"—Sub No. 84, is the designation assigned by the Interstate Commerce Commission to an application filed by the Plaintiff in 1947 for permanent authority to transport ammunition and explosives. In considering such applications as the Plaintiff's, the Commission determines whether the authority sought is required by present or future public convenience and necessity and whether the applicant is fit, willing and able to perform the service for which it seeks authority.

In such proceedings, as I have previously mentioned, competitors are permitted to participate in the proceedings and to present evidence to show that the application should not be granted. In Sub 84 these participants included both railroads and motor carriers. The Plaintiff's application was initially denied by the Commission but this denial was vacated by the Supreme Court. The application was reinstated and new hearings were ordered in 1951. At this time approximately sixty other motor carriers also asked the Commission for permanent authority to transport ammunition and explosives. These cases

were consolidated, that is, the Plaintiff's application was heard separately, but by agreement between the parties, evidence introduced during the Plaintiff's hearing was incorporated by reference into the record made with respect to the other applications. Some of the railroad defendants intervened in these proceedings.

In 1955, the Interstate Commerce Commission decided that no permanent authority would be granted to anyone, but did grant temporary authority for a five-year period for certain points to four of the applicants, including the Plaintiff. The Commission postponed any actual grant of authority to the Plaintiff pending further hearings concerning the Plaintiff. In 1959, the Plaintiff voluntarily asked the Commission to dismiss its application and the request was granted.

In January, 1952, certain Eastern and Western Railroads filed a petition with the Interstate Commerce Commission asking the Commission to interpret the scope of the temporary authority to transport ammunition and explosives which had previously been granted to Plaintiff under an application denominated MC-200 (Sub No. 60 TA—meaning "temporary authority"). The Interstate Commerce Commission held that certain of the service in the transportation of ammunition and explosives which Plaintiff was then carrying on was not within the scope of the authority granted in MC-200 (Sub 60-TA) and therefore was not authorized. Plaintiff was directed to cease and desist from such operations and to limit its operations under Sub 60 TA to service particularly described by the Interstate Commerce Commission in its report.

Plaintiff appealed this order of the Interstate Commerce Commission to the United States District Court for Missouri and to the Supreme Court of the United States where it was affirmed and became effective on December 28, 1953, the effective date of the order having

been postponed by successive stays issued respectively by the Interstate Commerce Commission, the District Court and the United States Supreme Court.

On July 14, 1952, the Public Utilities Commission of Ohio petitioned the Interstate Commerce Commission to revoke all of Plaintiff's interstate operating authority through the State of Ohio, alleging that Plaintiff had committed an excessive number of violations of the laws of the State of Ohio, and the regulations of the PUCO and the Interstate Commerce Commission in the course of its operations through that state. This petition was designated by the Interstate Commerce Commission as MC-C-1413. The action of the PUCO in filing the petition was the only means by which the PUCO could obtain the relief which it sought.

Shortly after the PUCO filed its petition, Riss requested the ICC to compel the PUCO to furnish Riss with certain specific information respecting each of the violations charged by the PUCO's petition. By order dated May 21, 1953, the ICC granted that motion in part, and directed the PUCO to provide more specific information of the details of the violations which it charged.

On April 12, 1954, the Interstate Commerce Commission ordered the PUCO to furnish the particulars which the Interstate Commerce Commission had previously ordered it to furnish by its order of May 21, 1953 or to dismiss its petition if such particulars were not furnished. On April 23, 1954, the particulars were furnished and incorporated in an amended complaint.

After the Interstate Commerce Commission granted a later motion by Riss to strike certain of the violations originally charged, the PUCO ultimately filed its third amended complaint with the ICC on January 12, 1955. That third amended complaint is in evidence here as C. & O. Exhibit No. 59.

In September, 1954, the PUCO formally requested the Interstate Commerce Commission to investigate the safety

of operations of Riss & Company. In April, 1954, Riss & Company had informally and voluntarily asked the ICC to make an investigation of the safety of its operations, but the ICC did not then order such an investigation.

On March 24, 1955, the Interstate Commerce Commission on its own motion ordered an investigation into the safety of Riss & Company's operations for the purpose of determining the extent of plaintiff's compliance with the Interstate Commerce Act and the ICC's rules and regulations issued thereunder. That order provided that, if Riss were found to have wilfully violated the law, an order might be entered immediately suspending Riss's operating authority, or, in the alternative, that an order could be entered requiring compliance and, if Riss thereafter failed to comply with that order, its authority could be revoked. This proceeding was designated MC-C-1783.

By order of the Commission, MC-C-1413 and MC-C-1783 were heard on a joint record in a single hearing. On September 26, 1957 the Interstate Commerce Commission held that the Plaintiff was not then in compliance with certain of the rules and regulations prescribed by the Interstate Commerce Commission relative to safety. The Interstate Commerce Commission then ordered Plaintiff to cease and desist from violations of the type described in the Interstate Commerce Commission's opinion, and to bring its operations into compliance with all of the rules and regulations of the ICC relating to safety. The ICC did not terminate the case at that time and held the proceedings open for the purpose of enabling Riss to show after the expiration of one year from the effective date of the Commission's order—November 4, 1957—that it was then in compliance, and to permit the State of Ohio or the ICC's own enforcement branch to obtain an order of suspension or revocation if Riss did not establish such compliance.

On May 2, 1958, Riss petitioned the Interstate Commerce Commission for postponement of a scheduled hear-

ing in MC-200 (Sub 84) as to its fitness for concurrent consideration of MC 200 (Sub 84) MC-C-1413 and MC-C-1783, and for expedited termination of proceedings in MC-C-1413 and MC-C-1783 (Plaintiff's Exhibit No. 19).

By Order dated June 16, 1958—Plaintiff's Exhibit No. 20—the Interstate Commerce Commission postponed indefinitely the hearing in Sub 84, and denied the petition to expedite termination of proceedings in MC-C-1413 and MC-C-1783 for the reason that the petition was premature and sufficient grounds had not been shown why Riss should not be required to observe the full year before which a petition could be filed under the Interstate Commerce Commission's prior order.

On August 5, 1959, Riss & Company petitioned the Interstate Commerce Commission for a dismissal of the proceeding upon the ground that it had then achieved substantial compliance with the regulations in question, and on January 27, 1960 the proceeding was dismissed. At the same time the prior cease and desist order was vacated.

Now, in summary then, the principal overt acts charged in the original complaint filed on September 22, 1954 were the alleged public relations campaign, the alleged sponsoring of restrictive legislation and the alleged abuse of the right of intervention before the Interstate Commerce Commission. This phrase "overt acts" means acts done to effect the object of the conspiracy. In other words, before the offense of conspiracy is completed, one or more of the parties must do some act to effect the object of the conspiracy. Such act is termed an overt act. An overt act as effecting the object of a conspiracy must be one independent of the conspiracy and agreement. It must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent, independent act following the complete agreement on conspiracy and done to carry into effect the object of the original combination.

Now, the first issue you have to determine is whether or not there was in existence prior to the filing of the Plaintiff's complaint on September 22, 1954, the conspiracy alleged in that complaint as I have summarized it for you. If you determine that there was no such conspiracy, then you will return a verdict for the Defendants. If you determine that there was such conspiracy, and I do not suggest that there was or was not, then, for your second step, you may consider whether or not the overt acts which are the subject of the supplemental complaint filed on January 31, 1958 were or were not acts taken pursuant to that conspiracy.

Now, the subject matter of this supplemental complaint is, as you will recall, as follows: The Plaintiff claims that on or about October 20, 1955, the Eastern Railroad defendants caused to be submitted to officials employed by the Department of Defense, a uniform, unpublished rate quotation by and on behalf of those railroads engaged in carrying explosives traffic in competition with the plaintiff. That quotation, as allegedly supplemented by later quotations issued in March and April, 1956 by the Western and Southern Railroads, Plaintiff charged, established railroad rates for carrying explosives shipments totaling more than 50,000 pounds which were allegedly nearly 40 percent below the general level of rates prevailing for the previous eight years.

Plaintiff claims that these alleged uniform and concerted rate reductions were intended to exclude the Plaintiff from the business of carrying such shipments of explosives and did not have that effect with respect to the principal points served by the Plaintiff. Plaintiff claims that the quotations were made for the purpose of effectuating one of the principal objects of the conspiracy—namely, to-wit, the elimination of the plaintiff as a competitor of the railroads for explosives traffic and that the rate reductions substantially injured Plaintiff's business.

Now, with regard to this charge of the Plaintiff that the rate reductions were overt acts taken pursuant to a pre-existing conspiracy, defendants claim that such rates were adopted in conformity with formal agreements approved by the Interstate Commerce Commission; that these rates were in fact a series of joint rates which were not uniform and that such rate quotations to the Department of Defense were in fact submitted at the express request of the Defense Department which allegedly asked the railroad defendants for a substantial reduction in the joint rates for the transporting of explosives; that the Defense Department encouraged and, in fact, required such joint action by the railroad carriers in quoting rates for the transporting of explosives and, finally, that these rate changes were based on sound business judgments then prevailing in the transportation industry, including the competitive conditions prevailing at the time and that these rate changes were reasonable responses to circumstances in the transportation industry, including factors of competition. These issues, of course, are for you the jury to resolve.

Now, Section 5A of the Interstate Commerce Act authorized railroads to agree on rates to be charged by the railroads and to employ for this purpose rate bureaus such as the Traffic Executives Association, the Southern Freight Association and the Western Traffic Association.

You are instructed that all railroad rates here in question were made pursuant to the procedures specified in the various railroad rate agreements which have been approved by the Interstate Commerce Commission. You should understand, in considering whether or not these rate reductions were made pursuant to the pre-existing conspiracy, that the Plaintiff does not contend that these rate reductions were illegal in and of themselves. You may assume that these rate reductions, like the alleged overt acts which occurred prior to the complaint, are all

perfectly legal acts when viewed apart from the alleged conspiracy. As in the case of the other alleged overt acts, the important issue for you to determine is what was the purpose of the rate reductions. If you find that these rate reductions were part of an effort by the Defendants in combination or conspiracy to eliminate the competition of the Plaintiff in transporting ammunition and explosives for the United States Government, rather than used merely to meet that competition, they would be removed from the protection of Section 5A of the Interstate Commerce Act.

If you find, as the Defendants claim, that the reductions were in fact made only to meet the competition afforded by the Plaintiff and other truckers, then you may infer from that fact that the reductions were not made pursuant to the alleged conspiracy. If, on the other hand, you find as the plaintiff alleges, that the purpose of the reductions was not to meet the truckers' competition but was in fact to eliminate that competition and thus obtain a monopoly share of this traffic for the railroads, then you may infer from that fact that the reductions were made for the purpose of effectuating the alleged pre-existing conspiracy, if you find there was such a conspiracy, as the Plaintiff alleges.

Plaintiff has the burden of proof in this regard and has no right to damages from any rate reduction of which the Plaintiff complains unless its proof has convinced you by a fair preponderance of the evidence on each of the three following points:

1. Prior to the October, 1955 rate reduction, two or more of the Defendants must have been engaged in the alleged pre-existing conspiracy which contemplated, if necessary, the use of rate reductions.

2. The rate reductions must have been determined upon and employed by those defendants not for the

purpose of meeting truck competition, but pursuant to that conspiracy for the specific and deliberate purpose of eliminating that competition.

3. The rate reductions must have damaged Plaintiff and the evidence must provide you with a reasonable basis for estimating the amount of this damage.

If you are not convinced by a fair preponderance of the evidence on any one of these points, you should ignore all evidence with respect to rate reductions in this case.

I might mention at this time that in connection with the rate-reduction evidence as well as other evidence in the case, there has been introduced what the law calls "expert testimony". In this connection, you are instructed that a person who, by education, study and experience has become an expert in any art, science, or profession and who is called as a witness, may give his opinion as to any matter in which he is specially versed and which is material to the case. It should be considered and weighed by you like any other evidence in the case. You are not bound by it if the facts upon which the opinion is based have not been established to your satisfaction by the evidence.

Further, in this case there has been some conflict in the testimony of expert witnesses. By considering and weighing the credibility and qualifications of the respective experts who have testified, the logic of the reasons given in support of their opinions, the other evidence in the case which favors or opposes a given opinion, and by using your own experience and good judgment as reasonable and intelligent people, you must resolve that conflict and determine which of the opinions to accept as accurate.

Now, again, in connection with the rate reductions, the Plaintiff makes no claim for damages resulting from any of the so-called "point-to-point reductions." As I have mentioned so often, the intent of each railroad defendant

in making these rate reductions is of primary importance in this case. Thus, as I have instructed you with respect to each such railroad defendant, unless you are convinced by a fair preponderance of the evidence that the rate reductions made by the particular defendant or defendants were made for the purpose of eliminating the competition of plaintiff or all truckers, instead of to meet that competition, those rate reductions are to be disregarded in this case, and this purpose, of course, may be derived from all the evidence and depends on the existence of the alleged pre-existing conspiracy.

There has been introduced into evidence excerpts from the testimony in the so-called "reparations cases," which I have previously mentioned. One of these cases involved the question of whether the rates charged by the railroads for the transportation of ammunition and explosives from 1942-1945 were unreasonably high. The Commission held that they were not.

Further, there has been extensive evidence on the question of whether the rate level established by the rate reductions of 1955 and 1956 was compensatory, that is, profitable. You should not consider that your only task in considering these rate reductions is to determine whether this level was compensatory or not compensatory. Plaintiff does not charge that these rates were not compensatory or that they were unreasonable. Any compensatory nature of the rates may be considered as a relevant factor in determining whether or not the reductions were made pursuant to a pre-existing conspiracy; that is, that factor would be a consideration in your determination of the purpose of the rate reductions. However, in determining whether or not the reductions were or were not made pursuant to the alleged pre-existing conspiracy, it is that purpose—the purpose of the reductions rather than the legality or illegality of the resulting level of rates—that is controlling in your decision on this point.

Further, in ascertaining a railroad's intent in reducing rates, you must consider whether the rate reductions were necessitated by truck competition. In this regard, you may consider the testimony concerning the level of truck rates before and after the rate reductions were made.

Also, one of the things you should understand in the course of your deliberations is the general meaning and effect of Section 22 of the Interstate Commerce Act, which you have heard mentioned on several occasions in the context of Section 22 Quotations. You will recall that the challenged rate reductions were made by the use of Section 22 of the Act, the so-called "Section 22 Quotations." Virtually all of the Government ammunition and explosives traffic, which is the subject of the plaintiff's charge against these defendants, moved these so-called Section 22 Quotations. Section 22 states, so far as it is applicable here, that "nothing in the Interstate Commerce Act shall prevent the carriage, storing or handling of property free or at reduced rates for the United States."

Now, whether or not these rates were reasonable or unreasonable, or discriminatory or non-discriminatory, under the standards of the Interstate Commerce Act, is not here for determination by you. You may assume, therefore, for the purposes of this case, that each of these rates was in and of itself a lawful rate.

You may also assume, as I have previously mentioned, that the procedure by which these rates were quoted was perfectly lawful rate-making procedure. Remember that the rate issue that you must determine is whether or not, regardless of the lawful means by which the rate reductions were accomplished and the lawfulness of the rates standing by themselves, and the reduction was in fact made for the purpose of eliminating the competition of Plaintiff or all truckers or were to meet that competition. If the purpose of the reductions was in fact to carry out a pre-existing conspiracy to monopolize the transporta-

tion of ammunition and explosives for the United States Government, then the defendants are liable for the resulting damages, if any, to the Plaintiff, regardless of the legality of the reductions viewed apart from the conspiracy.

Now, before I instruct you on the law relating to damages, I wish to instruct you on certain matters which you have had explained from time to time during the course of the trial. You will recall that I told you that the Court had determined as a matter of law that all of the evidence introduced by the Plaintiff might be received against all Defendants. This does not mean, however, that the Court has decided either that the alleged conspiracy has been proven or that the participation of any one of the defendants in the alleged conspiracy has been proven. The jury is the sole judge of these fact questions.

You are further instructed that, if you find from all of the evidence, that the conspiracy alleged by the Plaintiff, did in fact exist, that does not resolve the question of the participation of any defendant in that conspiracy. You still must decide as to each defendant whether that particular defendant did, in fact, participate in the alleged conspiracy. And, in determining whether or not a particular defendant did, in fact, participate in the alleged conspiracy, you must decide this solely on the basis of the evidence independently admitted against the particular defendant.

Ordinarily, the law holds a person liable only by reason of his own acts and utterances. But where two or more persons combine to achieve an unlawful purpose, the acts and declarations of one, during the existence and in pursuance of the conspiracy, are held in law to be called the acts and declarations of the others. But one person may be held responsible for the acts or utterances of the other if, and only if, the two are acting in concert to a common unlawful purpose.

Now, I think maybe I had better give the Jury about a ten-minute recess at this point.

(At 3:30 p. m. a ten-minute recess was taken.)

The Court: Now, to continue.

To illustrate one aspect of this rule, I will give you a simple illustration of its application in a situation not related to this case. You will recall that I gave you this example from time to time during the trial. Suppose three persons, which I shall call A, B and C, are charged with a conspiracy to rob a bank. Suppose further, that a letter written by A to B is introduced into evidence and this letter states that A has obtained three guns to be used by A, B and C in carrying out their plan to rob the bank. Now, that letter could be considered by you as evidence that A had entered into a conspiracy to rob the bank and had obtained three guns for that purpose. But the letter is neither an act or declaration of B or C and, standing alone, could not be considered by you as proof that either B or C had participated in the conspiracy to rob the bank even though they are mentioned in the letter and the letter was mailed to C.

Further, these declarations must be more than mere narratives. However, when a party joins an existing group already so engaged; that is, engaged in a conspiracy, then he assumes responsibility for all that has been done theretofore; that is, before the time he joins. All that was done before he entered may be used against him.

You are further instructed in this regard, that every person is presumed to intend the natural and probable consequences of his voluntary acts. Further, while there are many defendants to this action, it does not follow from that fact alone that if one is liable, all or others are liable. Each is entitled to a fair consideration of its own defense. These instructions I give you govern the case as to each defendant, to the same effect as if it were the only

defendant in this action, and regardless of whether I refer to the defendant in the singular or use the plural form. Therefore, it is important that you give separate consideration to each defendant on the basis of its own acts and declarations, as shown by the evidence admitted against it or introduced in its behalf, in determining whether a particular defendant conspired. Therefore, you should not consider the defendants as a group, or the railroads as a group, or the Southern railroads, for example, as a group, or the associations as a group. Each defendant, whether a railroad, railroad association or public relations firm, is entitled to separate consideration.

I will now instruct you with respect to damages and the standards which the plaintiff must meet to sustain its burden of proving that it has been damaged. You are not to assume from the fact that I instruct you on damages that I hold the view that the plaintiff has or has not proved that any of the defendants engaged in a conspiracy, or that any of them engaged in any acts in furtherance of such a conspiracy, or that the plaintiff has or has not been damaged. Those matters, of course, are for you the jury to decide.

Plaintiff has the burden of proving the existence of the causal relationship between defendants' alleged misconduct and some injury to the plaintiff. That is, it must prove by a fair preponderance of the evidence that its business or property has, in fact, been damaged as a direct result of a conspiracy, as previously defined, among two or more of the defendants. Proof of this necessary causal relationship requires something more than proof that one or more of the defendants did something at or about the same time that the plaintiff's business declined. The plaintiff must show by positive proof that it suffered damages as a result of an unlawful conspiracy. Further, if you find that the plaintiff is entitled to recover, you are not to allow as damages any loss of profits resulting from

activities which you find to be illegal or any diminution in net worth resulting from profits which you find were earned through any illegal activities.

These instructions on damages are given to you solely to guide you in arriving at the amount of your verdict only in the event, as I have already mentioned, that you find from a fair preponderance of the evidence, and the instructions of the Court, that plaintiff is entitled to recover. Thus, if from the evidence, considered by you in the light of the instructions of the Court, you find that none of the defendants has conspired, then, of course, you will not need to observe these instructions which I give you concerning damages.

Now, remember that you have to find two things in regard to this question of damages, if you find that the conspiracy alleged did in fact take place. First, you must find that the rate reductions of the defendants were the cause of plaintiff's losses, if any, and, second, you must determine the amount of those losses, if any. In other words, before you start calculating what the amount is, you must first find that the plaintiff was injured as a result of the rate reductions. Now, in this regard, the plaintiff contends that the alleged conspiracy of the defendants and the rate reductions allegedly pursuant to it, were what caused its losses, if any. Defendants, on the contrary, have introduced evidence which they claim shows that many other causes or events caused the injury, if any, and not any action that they allegedly took against the plaintiff. Plaintiff has denied that these events or causes were what made its business decline, if it did decline. You will recall the great amount of evidence introduced on this subject of damages and its alleged causes. I will not undertake to review it for you at this time. However, these issues on what caused the damages, if any, to the plaintiff are for you the jury to decide, and you may consider all of the factors and all the evidence relating to it.

The plaintiff, however, must show in this connection that the defendants alleged unlawful acts were either a cause of a specific fraction of its losses, or a more substantial cause of its losses than was any other known factor or factors. You may not render a verdict based on speculation or guess work, but on the other hand you may act on the probable or inferential, as well as on direct and positive proof.

There is no proof that plaintiff lost any business, either in general commodities or ammunition and explosives by reason of publicity published or circulated by defendants. Accordingly, in determining the amount of plaintiff's damages, you must consider only the losses plaintiff experienced in the period October 17, 1955—January 31, 1958; that is, following the general rate reductions.

Further, plaintiff cannot recover in this action for any damages incurred after January 31, 1958, when its supplemental complaint was filed, even if such damages were caused by the alleged conspiracy. Further, if you find that plaintiff has suffered any damage by reason of the action or inaction of the ICC or other regulatory agencies, the enactment or failure of enactment of any statutes, ordinances or regulations or the enforcement or lack of enforcement of any statutes, ordinances or regulations, such damages are the result of governmental acts of the States of Federal Government and may not be made the basis for any recovery in this action.

In this case, plaintiff has sought to measure its damages by showing the amount of the injury allegedly sustained to the good will of its business; that is, the product of an estimate of the earning prospects of the business.

Now, injury to good will is the kind of injury for which a plaintiff injured by a violation of the antitrust laws may recover damages—of course, whether or not such damages are recoverable in this case, and the amount thereof, are matters of fact solely for your determination.

In determining the amount of plaintiff's damages, if any, you may take into consideration any estimates by experts on what the plaintiff's going concern value would have been, absent the alleged actions of the defendants; what the plaintiff earned in the past—that is, before the alleged acts complained of—and what plaintiff's earnings were when compared with a comparable competitor. In this case, the plaintiff claims that it has provided the best available evidence from which a reasonable estimate of the alleged damage to its good will may be made. The defendants, on the other hand, claim that the plaintiff's evidence does not show such damages and, in any event, it is not the best available evidence of such damages, if any. Of course, this is a matter for you the jury to determine from all the evidence in the case. Now, in regard to this matter of the evidence offered on the extent of the plaintiff's alleged damages, you must keep in mind that in cases of this sort, the plaintiff does not have to prove his injury to an exact dollars and cents amount. It is sufficient if plaintiff's evidence on the extent of his alleged damages is a reasonable basis from which the jury may draw a reasonable inference or estimate of the extent of the damages, if any. The weight of this evidence offered by the plaintiff is, of course, for you the jury to decide. As I have mentioned, the amount of the plaintiff's damages, if any, cannot be left to speculation or conjecture, but t need not be proven with complete exactness either. It is sufficient if you find that there is a sufficient basis in the evidence from which a reasonable estimate of the plaintiff's losses, if any, may be reasonably inferred. Of course, in this connection, you must keep in mind my earlier remarks to the effect that the plaintiff has the burden of proving that the alleged unlawful acts of the defendants were either a cause of a specific fraction of its losses, if any, or were a more substantial cause of its losses than was any other known factor or factors. Of

course, it goes without saying that you cannot award the plaintiff damages for any losses which you find were caused by acts for which the defendants were not responsible.

Basically then, the plaintiff's theory of damages is that certain activities of the defendants have caused a diminution of the going concern of Riss & Company. In order to collect damages on this theory, plaintiff must first have proved by a fair preponderance of the evidence that activities of some or all of the defendants did, in fact, cause an injury to Riss and Company, and, second, plaintiff must also have provided you with a reasonable basis for estimating the amount by which the going concern value was lessened by activities of the defendants as distinguished from other causes.

In any event, if you find for the plaintiff, your verdict will be a verdict for a single lump sum against all of the defendants you find liable for the alleged conspiracy; and you will not undertake to apportion the plaintiff's damages against such defendants.

These remarks conclude my instructions concerning the liability and damages aspects of the case. I will now conclude with some additional remarks concerning the types of evidence which you have heard and some aspects of your duties as jurors. You will recall that in this case certain testimony has been read to you by way of what is called in law a deposition. You are instructed that this testimony is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of the witnesses who have confronted you on the witness stand, and the same judgment on your part with reference to its weight, as is the testimony of the witnesses who have confronted you on the witness stand, and you are not to discount it merely because it comes to you in the form of a deposition.

Further, plaintiff and various defendants have, in the course of preparing this case for trial, answered certain interrogatories; that is, questions propounded in written form by the opposing party and have agreed to certain admissions. You will recall that during the course of the trial some of these interrogatories and answers thereto and certain admissions have been read to you. You are to accept such answers and admissions as true.

There is another rule of law that may be of help to you and that is pertinent to this case. If a witness is not produced who is peculiarly available to one side or the other, or to any particular party to this litigation, then the jury has a right, if it wishes to do so—and it is entirely within the jury's discretion—to draw the inference that the testimony of that absent witness, the witness who is not called, would be unfavorable to the party that has failed to call the witness, unless the absence of the witness is sufficiently accounted for or explained.

You will notice in this instruction that the words "peculiarly available" are used. It is for the jury to decide whether or not any of the persons whose names have been mentioned by counsel in their argument to you are peculiarly available to any party in this litigation.

In connection with this matter, you will recall that I informed you on several occasions during the trial that when any party calls a witness to the witness stand to testify on its behalf, that party vouches for the credibility of that witness. In other words, the party calling that witness in effect tells the jury that we want or hope that you believe this witness and accept his testimony as truthful.

Sometimes it happens that a party will call what is known as an unwilling, unfriendly or hostile witness to the stand, and instead of vouching for the credibility of that witness he may, with the permission of the Court, proceed to cross-examine that witness and treat him as

an adverse witness. You will remember that that was done by one of the plaintiff's attorneys in this case in connection with one of the witnesses he called to the stand.

You should also keep in mind that any party to this litigation can have a subpoena issued from the Clerk's office of this Court directed to any witness who lives within a radius of one hundred miles of this jurisdiction, and have that person brought to court to testify. Besides, any party has the right, as you have learned during this trial, to take the deposition of any person no matter where he might reside in this country. Any party may go to the Clerk's office in any Federal Court located in any State, if he desires to take the deposition of a witness who will not appear voluntarily, and have a subpoena issued from that Federal Court directing that person to appear at a stated time and place and for the purpose of taking his deposition by oral examination, provided that person resides within 100 miles of that Federal Court.

You should also consider, in connection with this matter, whether or not any person whose name is mentioned, and who has not been called as a witness, whether or not if that person were called as a witness, in your opinion, he might give testimony that may be material to any issue or issues in this case. If a person has been in the courtroom during this trial and reference to his name has been made by any attorney, that person was available and could have been called by any party in this case to the witness stand, whether he be a layman or an attorney, and questions propounded to him.

A witness is not peculiarly available to a party unless there is some legal relationship between the witness and the party, such as an employment relationship. This relationship must have been in existence during the course of the trial. Just because a witness might be peculiarly available to a particular party in this case does not mean that he is peculiarly available to all parties. A party

does not incur the consequence of the absent witness rule merely because he fails to put on the stand a witness not deemed necessary to his case.

Now, if in these instructions any rule, direction or idea has been conveyed in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point in the instruction and ignore the others, but you are to consider all of the instructions as a whole and to regard each in the light of all of the others. You are instructed again that if the Court has said or done anything which has suggested to you that it is inclined to favor the claims or the positions of either party, you will not permit yourself to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intimated or intended to intimate to you any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established by the evidence, or what inferences should be drawn from the evidence adduced.

If any expression of mine has seemed to indicate any opinion relating to any of these matters, I instruct you to disregard it. From time to time, observing jurors, and you have been especially observant during the course of this trial, watch a Judge and try to determine whether he sustains the objections on one side more than he sustains them on the other, or whether he appears to rule more favorably toward one side or the other, and to try from some observation method like that to get an idea of what the Court thinks about a case.

To repeat, if any of you have by chance received any impression as to how the Court feels about this matter, I want you to dismiss that entirely from your mind because, as I have said on more than one occasion, you and you alone are the sole judges of the facts in this case and the credibility of the witnesses. I would also like to point out that in all of my rulings on the evidence and the ob-

jections and everything that has been before me, I have ruled as I thought the law requires me to rule, without ever intending to favor or to intimate any favor towards one side or the other in the case.

If the Court has made a mistake in its interpretation of the law in this case, then that is a matter that must be dealt with by our Court of Appeals. To repeat again, it is the duty of the jurors to accept the law as stated to them by the Court and to apply the law to the facts in the case.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but you should do so only after discussing it with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. You should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor a particular decision or hold an opinion at variance with your own. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Your verdict, of course, must be unanimous as to each party in the case.

Now, the attitude and the conduct of jurors at the outset of their deliberations are matters of considerable importance. It is not discreet for a juror, upon entering the jury room, to voice an emphatic expression of his opinion, or to announce his determination to stand for a certain verdict. When one does that at the outset, his sense of pride may cause him to hesitate to recede from an announced position if and when shown that it is wrong. Remember, that you are not partisans or advocates in this matter, but are now judges. The final test of the quality of your service will lie in the verdict which you return to

the courtroom, not in the opinions any of you may hold before agreement on a verdict. Bear in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court reminds you that in your deliberations in the jury room, there can be no triumph of other than the ascertainment and declaration of the truth.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

EXPLANATION OF VERDICT FORM BY TRIAL JUDGE TO JURY.

The Court: Good morning.

Now, ladies and gentlemen of the jury, before you retire to the jury room to begin your deliberations, I wish to explain to you the form of the verdict which the Clerk will distribute to you.

The first question on the form reads as follows, after you have been asked by the Court the usual question:

"Has the jury agreed upon its verdict?"

Then he will ask you this: The question reads as follows, rather:

"What is your verdict as to the plaintiff against each of the following defendants?"

Then each of the defendants in this case is listed. As you know there are 28 defendants.

Immediately below each defendant's name are two blank spaces. One entitled "For Plaintiff," and the other entitled "For Defendant." Those words are written right underneath the plaintiffs' spaces, underlined. When you have agreed upon a unanimous verdict, the foreman should write in the blank spaces the words "For the Plaintiff"

or "For the Defendant." It cannot be for both. It has to be for one or the other.

I will explain the form in a little more detail. At the top of the form, as I said, you will have one which will be filled in by the Foreman and handed to the Clerk. As I go along, I will explain that. Each juror will have his or her own copy to fill in to conform with the original.

On page 3 of the Form of Verdict you will notice a space for the total amount of the verdict in the event that you find for the plaintiffs against two or more of the defendants.

As I have heretofore told you, if your verdict is in favor of the Plaintiff against two or more of the defendants, you are not to apportion your verdict among the defendants. That means that you are not to award so much against one defendant, so much against another defendant, so much against another defendant, and so forth. You can not do that. Because you have to bring in one single lump sum if you find for the plaintiff. You may find for the defendants, I do not know.

But if you return a verdict for the plaintiff, your verdict will be in a lump sum against all of the defendants that you find against.

However, if your verdict is against the defendants, or against the plaintiff, rather, as to all of the defendants, it will not be necessary to answer this last question on page three. That question reads as follows, on page three:

> "If your verdict is in favor of the—What is the total amount of your verdict?"

Your foreman will then sign the original, and the original right in my hand has the note on it, "This is the original form of verdict and this is to be filled out by the foreman when a unanimous verdict has been reached and presented to the clerk."

As I stated, your foreman will sign the original form of verdict and also insert the date in the blank space provided for it.

Each of you will also receive a copy of this form of the verdict for your own convenience and when you return to the court room, after you have reached your verdict, each of you, including the foreman, should have before you your form of verdict signed by each juror in the said space indicated.

You will notice, of course, when you get to that point—and I have your name on each form of verdict, each juror's name and your name on the third page so there cannot be any mixup.

Only the original form signed by the foreman will be handed to the clerk by the foreman at the time he asks the jury if he has reached a verdict.

Please be careful to check with the foreman and make sure that your individual forms and the answers thereon conform exactly with the form signed by the foreman.

Now, just to elaborate or explain a little more in detail, these forms I have here, the 12 of them, the original form which will not be filled in until you arrive at your unanimous verdict, these are the others right here.

Now, I have listed the 28 defendants in the lefthand column under the first defendant, Association of American Railroads. The question is, "What is your verdict as to the plaintiff against each of the following defendants." If you find for the plaintiff it will be necessary for the foreman to write in there "For the Plaintiff."

If you find for the plaintiff as against that defendant, it will only be necessary to write in the space there, "For the Defendant."

It will be either for the plaintiff or for the defendant. There is only one answer. I think that ought to be clear enough. I hope it is.

THE JURY'S HYPOTHETICAL QUESTION.

The Court [to counsel]: I will read you a note I received from the foreman of the jury.

"We have a hypothetical question. If the jury should agree there was a conspiracy and voted for the Plaintiff but agreed the Plaintiff was entitled to no monetary damages, would this be an acceptable verdict to the Court? Signed Ethan Walther."

Now, my offhand feeling is this: I have instructed the jury on what I think the law is in the case. They have a form of verdict for them, and I prepared a little statement that I intended to read to the jury, unless you gentlemen can convince me that I am in error on this, which I think should answer the problem.

My statement is this: I have given this considerable thought, and this is what I expect to tell the jury. I will listen to some discussion on it.

"Ladies and gentlemen of the jury, the Court has given careful consideration to the note forwarded to it by the foreman. The Court feels that you have been fully and correctly charged with respect to the law applicable to the case, and you have available the form of the verdict.

"Therefore, the Court will not answer any hypothetical question, and you will have to be governed by the law applicable to the case and the facts." I will hear any discussion.

Mr. Ball: May I state my position, without having consulted the jury?

The Court: Incidentally, I hope you gentlemen don't let this go beyond this room. I am going to have to call the jury into the courtroom.

Mr. Ball: It is my position that the verdict which said, "We find for the Plaintiff," and then on the second part,

"None," when it comes to damages would be a proper verdict because it would be clear decision in the light of the instructions that the Court has given that this jury finds for the Plaintiff but has found no proof of damages upon which to base an award.

Then I think it would be immediately possible for the Court upon that to enter a verdict for six cents as nominal to conform with the law, and for that reason it seems to me that the answer to the hypothetical question should be that such a verdict would be legally acceptable.

Now that's the position that I wanted to state, and I haven't had a chance to consult.

Senator Wheeler: I think that what Mr. Ball had said would be correct, and it seems to me that the Court could very properly say that under the instructions, that that would be a legal answer to the case.

The Court: Let me hear from Mr. McKay.

Mr. McKay: I suppose, your Honor, if they find no damages it would be the verdict for all the Defendants. I would suppose that is what the law would be, and I should suppose the response is that if you find there are no damages, then your verdict should be for all.

The Court: I have said that in effect in the charge there.

Mr. McKay: Yes, but why can't you say, I would suppose you to say that if you find there is no damages then, I have already charged you that this means the verdict for all Defendants in referring to the point in your charge.

The Court: This may be just one Juror having some idea. You never know what this means to the Court, but I think this jury is intelligent enough to read that charge and say: All right, we will find three things. Let's find a conspiracy; let's find a causal connection between the conspiracy and any damages sustained by the Plaintiff. Then you must go further and find the amount of the damages so they have three things to decide, and I have told them several times during the trial.

Mr. McKay: There is no question of your instructions. Your instructions are perfectly clear, but apparently they aren't following.

I would suppose that the—I would suggest to it an appropriate course, you are saying: I have instructed you to find no damages, but then the dicta should be for the defendant.

The Court: Let me hear from Mr. Wright.

What is your position?

Mr. Wright: The question wouldn't be answered at all. It would only be answered correctly by a flat unequivocal no.

I agree with Your Honor that this course is not an attempt to answer hypothetical questions because you might invite a whole series.

The Court: That's right.

Mr. McKay: What is suggested is probably the best way to handle it.

Mr. McGlothlin: I think certainly, gentlemen, the law is your—as your charge states is correct that damages cannot be found. At least a private citizen hasn't a remedy. I think your chart so states; of course, I do recognize that there is one of them which says it is possible to give nominal damages, six cents damages. That case would go to waste. There are certain cases which would support it.

Maybe six cents I should say. I think there are cases that will support also the decision that if such a verdict came in, Your Honor would be bound to interpret it as the verdict of the Defendant.

So it seems to me that whatever you say you would have to say—it seems to me that this is such a verdict. You have to make up your own minds as to whether it is a verdict which you would interpret as being the verdict which would be the nominal damages. Whichever way you come out on that it seems to me that any reply you

give should make specific reference to the charge, in effect advise them to read the charge over again. As I heard your Honor's instructions, it didn't seem to me to be related quite as directly to the charge as I think it ought to be because after all the charge is the ground rules under which they are operating.

Colonel Rhoads: Primarily implementation of Mr. McGlothlin's statement, it seems to me in view of the length of the charge, it might be appropriate and helpful to the jury if you not only indicated the charge, but indicated the general area in the charge in which your instructions would be pertinent to this inquiry of theirs are directed—maybe Page 2 or what have you, I have forgotten myself, but it seems to me it would be helpful to them.

The Court: I think they have given this thing a lot of thought. I think I will do what I have indicated I thought I should do when I first came in.

I will just tell them apply to all the facts of the case, I am not going to answer. If they can't read it between the lines on that. They have—they can just read the charge. They have undoubtedly read the material several times by now. And with all the instructions we have been given all during the trial, obviously just like Mr. Shea said, if they find a conspiracy say against two or more or all of the Defendants, and they find absolutely no damages, then it is necessarily or logically following they must file for the Defendants. That is just as plain as you can make it.

That is the purpose of the whole thing to be acted on.

Mr. McKay: I think your charge clearly says that. I would just feel it would help them along by just saying: My charge tells you that if you can't find any damages, then your verdict is——

The Court: Senator?

Senator Wheeler: I think what you are saying is appropriate. On the other hand, I think it could be said that such a verdict under the instructions will be a proper verdict.

The Court: Now, if they did come in and said to the Plaintiff against, say, ten Defendants, and they say no damages, the Court would have to send them back out and say, I cannot accept this verdict because they have got to find either two cents or ten dollars.

Mr. Ball: I don't agree with that.

Mr. McKay: Wouldn't it therefore be appropriate for Your Honor not necessarily answering the specific hypothetical question, but simply to repeat what you said a few moments ago about the three elements which is obviously the direction to it, and it seems to me that would be helpful to the jury in the posture that you are now in.

Senator Wheeler: In other words, you can find the Defendant guilty of negligence, but no damages. And that has been——

Mr. McKay: Your Honor, let me ask this, if I may: Why couldn't you say, Now I have fully covered this in my chart, but if you want to know what the form of your verdict should be in the event you find no damage, the form of your verdict should be a verdict for all Defendants?

The Court: I am trying to find that part. We are talking about damages.

Mr. McKay: It starts at page 40, I think, Your Honor.

The Court: Here it is.

Well, there is one part in it my charge where I said, You have to find three things in this case. It bears on the causal connection. That is the part. Would you try to find it? (Hands document to Law. Clerk.)

The Court: I have this typed up especially for the charge so it wouldn't have the citation. There is one place I summarized it.

Mr. Wheeler: There. That is the only thing I have. It is difficult for a non-lawyer to wade through it and find the pertinent part.

The Court: I am going to hear from the Plaintiffs.

Mr. Wright: If you want to know what the Plaintiff's

position is on this I repeat it is either a flat unequivocal no answer or what you have just when you first came in rather than some attempt to single out, answer the question by singling out several parts of the charge. I think that would be prejudicial error.

The Court: I have given this a lot of thought and I think I am right on doing it. I am going to make this statement so there won't be any possible error; and then if they come back later that's the thing. I am going to read them the statement I prepared and let it go at that, and then they will go back and read their charge, I hope. That is on page 56.

That is where I said: I will now instruct you with respect to damage and the standard which the Plaintiff would meet to sustain the burden of proof that it has been damaged.

You are not to assume the fact that I instruct you on damages that I hold the view that the Plaintiff has or has not proved that any of the Defendants engaged in any conspiracy, or that any of them engaged in any acts further of such conspiracy, or that the Plaintiff has or has not been damaged. These matters, of course, are for you, the jury, to decide.

Plaintiff has the burden of proving the existence of causal relationship between Defendants' alleged misconduct and some injury to the Plaintiff, that is, it must prove by a fair preponderance of the evidence that its business or property has, in fact, been damaged as a direct result of a conspiracy as previously defined among two or more of the Defendants.

Proof of this necessary causal relationship requires something more than proof that one or more of the Defendants has something at or about the same time that the Plaintiff's business declined. The Plaintiff must show by positive proof that it suffered damages as a result of an unlawful conspiracy.

Further, if you find that the Plaintiff is entitled to recovery you are not to allow as damages any loss of profits resulting from activities which you find to be illegal or any dimunition and net worth resulting from profits which you find were caused—I haven't got my glasses on—what is that word—earned through any illegal activity.

Anyway, this is very simple. The jury can read this again.

Well, I think monetary damages will mean monetary damages.

Mr. Ball: That is speculating.

The Court: I think they know they are fighting for money.

All right, I am going to read them this statement, gentlemen, and we will bring them in at 1:45. Bring them in to this court room. Into the ceremonial court room at 1:45.

(At 1:25 p. m. the proceeding recessed.)

(The following occurred in the presence of the jury in the ceremonial court room:)

Deputy Marshall: This Honorable Court is now in session.

The Court: Ladies and gentlemen of the jury, the Court received the note from the foreman, which reads as follows:

"Judge Sirica, we have a hypothetical question.

"If the jury should agree there was a conspiracy and voted for the Plaintiff, but agreed the Plaintiff was entitled to no monetary damages, would this be an acceptable verdict to the Court?. Signed Ethan Walther."

Ladies and gentlemen of the jury, the Court has given careful consideration to the note forwarded to it by your foreman. The Court feels that you have been fully and clearly charged with respect to the law applicable to this case, and you have available the charge and the form of the verdict.

Therefore the Court will not answer any hypothetical question and you will have to be governed by the law applicable to the case and the facts.

I will ask the jury to continue their deliberation.

THE JURY'S REQUEST TO BE DISCHARGED.

The Court: This note states as follows: "Mr. Sirica, after nine days of deliberation the members of the jury have not been able to come to a unanimous verdict. (Signed) Ethan Walther."

This is the charge I am going to read to the jury from the Allen case. Of course, the first part of it is not from the Allen case, but the substance of it is.

I think Mr. Ball read this the other day. I have only added one sentence:

"Ladies and gentlemen of the jury, this instruction has been approved by the Supreme Court of the United States:

"You should endeavor to reach a verdict in this case if it is at all possible. It seems to me you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion, if possible. Of course, the verdict of the jury should reflect the opinion of each individual juror, but it by no means follows that opinions may not be changed by conferences in the jury room. The very object of the jury system is to secure a unanimity by comparison of views and by agreements among the jurors themselves. Each juror should listen with deference to the arguments of the other jurors, with a distrust of his own judgment, if he finds the large majority of the jury takes a different view of the case from what he himself takes.

"No juror should go to the jury room with a blind determination that the verdict should represent his

opinion of the case at that moment, or that he should close his ears to the argument of other jurors who are equally as honest and intelligent as himself.

"Accordingly, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you, however, that you should examine the issues submitted with an open mind, and with a candor and with proper regard and deference to the opinions of each other.

"It is your duty to decide this case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced. If much the larger number of jurors favor one side or the other, a dissenting juror should consider whether, in the light of the opinions that are expressed by the other jurors, in the jury room, he is not in error as to his views.

"I want you to go back to the jury room and continue your deliberations. Discuss the matter among yourselves in a friendly spirit and endeavor to agree upon a verdict."

I am going to suggest that I think probably the jury ought to go to dinner first and let the Marshal know if they wish to deliberate after having dinner; that is, when they arrive in the jury room. So we can wait around and find out what they are going to do. That is the only thing I can do.

Mr. Wright: If the Court please, I would like to make a suggestion—this one suggestion: I think there is a possibility, perhaps one chance in a thousand, but I think the chance should be eliminated in any event that these jurors may have concluded that a unanimous—when they say they can't reach a unanimous verdict that means they have not been able to reach a unanimous verdict as to all defendants.

To eliminate that I would not suggest any further instructions, but I do believe they might be asked a single question: "Have you been unable to agree as to the liability of any defendant?" That is, before the charge is given.

The Court: I think it is——

Mr. Wright: "Have you been unable to reach a verdict as to any defendant?

That is all I would suggest.

The Court: "Unable to reach a unanimous verdict."

Mr. Wright: Yes, as to any defendant.

Mr. McClothlin: That troubles me. Because it certainly implies that they have made a stride forward if they find two defendants were in a conspiracy.

As far as I am concerned, they have not made a stride forward. They have still got a number of questions to reach before they could reach the question of a verdict against any defendant.

Senator Wheeler: It might indicate that they might think that the Court felt they reached a unanimous agreement at that as to some of them.

The Court: Well, let me ask you this: Is there any objection to this: "Have you been able to reach a unanimous verdict as to the plaintiff against two or more of the defendants?"

Mr. Ball: Oh, no, no.

The Court: Here is what I am going to do. I am going to give the Allen Charge, like it is, just give it to them. Then if they report in a day or so that they are hopelessly deadlocked, before I finally discharge them I am going to try to find out, I think we should, if they have been able to arrive at any unanimous verdict in the case of the plaintiff against any of the defendants. Then we will finally determine that.

I think this jury is intelligent enough to know that, with all of the arguments that have been had in this case, that

they have to decide each individual case. There are twenty-eight cases here.

Mr. Wheeler: The verdict set that out, your Honor.

The Court: I have got that set up in the verdict, yes. I will give them this instruction just as it is. If there is objection you may note it now.

* * * * * * *

The Court: Ladies and gentlemen of the jury, the Court received this note from the foreman:

"Judge Sirica, after the nine days of deliberations, the members of the jury have not been able to come to a unanimous verdict." (Signed) Ethan Walther.

Ladies and gentlemen of the jury, this instruction of law which I am about to give you has been approved by the Supreme Court of the United States.

"You should endeavor to reach an agreement in this case if at all possible. It seems to me you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion, if possible. Of course, the verdict of the jury should reflect the opinion of each individual Juror. But it by no means follows that opinions may not be shared by conferences in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by agreements among the Jurors themselves. Each Juror should listen with deference to the arguments of the other Jurors, and with a distrust of his own judgment if he finds the large majority of the jury takes a different view of the case from what he himself takes. No Juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment.

"Or that he should close his ears to the argument of other Jurors who are equally as honest and intelligent as himself.

"Accordingly, although the verdict must be the verdict of each individual Juror and not a mere acquiescence in

the conclusion of your fellow Jurors, the Court instructs you, however, that you should examine the issues submitted with an open mind, and with candor and with proper regard and deference to the opinions of each other.

"It is your duty to decide this case, if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced. If much the larger number of Jurors favor one side or the other, a dissenting Juror should consider whether, in the light of the opinions that are expressed by the other Jurors in the jury room, he is not in error as to his views."

I want you to go back to the jury room and continue your deliberations. Discuss the matter among yourselves in a friendly spirit and endeavor to agree upon a verdict.

THE JURY'S FIRST ATTEMPTED VERDICT.

Deputy Clerk: Mr. Foreman, please rise.

Mr. Foreman, has the jury agreed upon a verdict?

The Foreman: Yes, sir, it has.

Deputy Clerk: May I have it, please?

The Foreman: Yes (handing document to the Deputy Clerk).

Deputy Clerk: Mr. Foreman, will you please rise?

The Court: Just a moment. You may be seated for a second, Mr. Foreman.

Will counsel come to the Bench, please?

(At the Bench.)

The Court: The Foreman of the jury has stated a verdict which has found as follows:

For the Defendant Association of American Railroads.

For the Plaintiff against the Association of Western Railways.

For the Plaintiff against the Traffic Executive Association—Eastern Railroads.

For the Plaintiff against the Eastern Railroad Presidents Conference.

For the Plaintiff against Carl Byoir & Associates, Inc.

For the Defendant Atlantic Coast Line Railroad Company.

For Defendant as to Atchison, Topeka & Santa Fe Railway Company.

For Defendant as to B & O Railroad Company.

For Defendant as to C & O Railway Company.

For Defendant Chicago, Burlington & Quincy Railroad Company.

For Defendant as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

For Defendant Chicago and Northwestern Railway Company.

For Defendant Chicago, Rock Island & Pacific Railroad Company.

For Defendant Erie Railroad Company.

For Defendant Great Northern Railway Company.

For Defendant Illinois Central Railroad Company.

For Defendant Missouri-Kansas-Texas Railroad Company.

For Defendant Missouri Pacific Railroad Company.

For Defendant New York Central Railroad Company.

For Defendant Northern Pacific Railway Company.

For the Plaintiff against the Pennsylvania Railroad Company.

For the Defendant St. Louis-San Francisco Railway Company.

For Defendant as to Southern Pacific Company.

For Defendant as to Union Pacific Railroad Company.

For Defendant as to Wabash Railroad Company.

For Defendant as to Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.

For Defendant as to Southern Railway Company.

For Defendant as to Seaboard Air Line Railroad Company.

In connection with the damages, the answers given to the question, "If your verdict is in favor of the Plaintiff against two or more of the Defendants, what is the total amount of your verdict.?" is "None."

Now, can we take a verdict like that?

Mr. McGlothlin: I think we have to.

Mr. Gates: I think you have to.

Mr. Wright: Your Honor——

The Court: I think you have to take that verdict.

Mr. Shea: That is clear.

Mr. Wright: It does not seem to me you have a verdict.

The Court: They find no damages but you have a verdict so far as the case is concerned against the various defendants.

Mr. Rhoads: That is it.

The Court: As you understand, of course, under the Clayton Act, the Plaintiff is entitled to reasonable counsel fees and costs and whatever the reasonable costs are.

Mr. Wright: I doubt if that is so, without a damage award, your Honor.

The Court: Then I will just have to tell the jury they can make any award they wish——

Mr. Gates: Oh, no. Wait a minute.

Mr. Shea: I think you have the verdict.

Mr. McGlothlin: A verdict is a verdict.

Mr. Gates: This is the verdict.

Mr. Shea: You can't interpret it.

The Court: In other words, they find the allegations have been proven but find no damages.

Mr. Rhoads: Against some.

Mr. McGlothlin: As to many of the defendants they are not proved.

The Court: Mr. Wright, the best that could probably be done—they may say six cents or something like this.

Mr. Rhoads: No, this is the verdict

Mr. Gates: Can't change the verdict now.

Mr. McGlothlin: You read that into the record. That is the record handed to the Court.

The Court: It is up to them to find the damages.

Mr. McGlothlin: And they found none.

Mr. Shea: I think it is clear.

The Court: All right, take the verdict.

(In Open Court)

Deputy Clerk: Mr. Foreman, will you please rise?

Mr. Foreman, what is your verdict as to the Plaintiff against the Association of American Railroads?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Association of Western Railways?

The Foreman: For the Plaintiff.

Deputy Clerk: For the Plaintiff?

The Foreman: Yes, sir.

Deputy Clerk: For the Plaintiff?

The Foreman: Association of Western Railroads? For the Plaintiff, yes, sir.

Deputy Clerk: What is your verdict as to the Plaintiff against the Traffic Executives Association—Eastern Railroads?

The Foreman: For the Plaintiff.

Mr. McGlothlin: Could I ask Mr. Walther to speak a little bit clearer.

The Foreman: I am sorry. I am nervous.

The Court: I think we are all nervous.

Deputy Clerk: What is your verdict as to the Plaintiff against the Eastern Railroads Presidents' Conference?

The Foreman: For the Plaintiff.

Deputy Clerk: What is your verdict as to the Plaintiff Carl Byoir & Associates, Inc.?

The Foreman: For the Plaintiff.

Deputy Clerk: What is your verdict as to the Plaintiff against the Atlantic Coastline Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Atchison, Topeka & Santa Fe Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Baltimore & Ohio Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Chesapeake & Ohio Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Chicago, Burlington & Quincy Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Chicago and North Western Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Chicago, Rock Island and Pacific Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Erie Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Great Northern Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Illinois Central Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Missouri-Kansas-Texas Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff, against the Missouri Pacific Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the New York Central Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Northern Pacific Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Pennsylvania Railroad Company?

The Foreman: For the Plaintiff.

Deputy Clerk: What is your verdict as to the Plaintiff against the St. Louis-San Francisco Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Southern Pacific Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Union Pacific Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Wabash Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Southern Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: What is your verdict as to the Plaintiff against the Seaboard Air Line Railroad Company?

The Foreman: For the Defendant.

The Court: Mr. Foreman, just a second. Now let me speak to counsel again.

(At the Bench.)

The Court: Before we ask this next question, Mr. Wright, do you have any objection to this verdict as it is? I do not see that you can have any objection.

Mr. Wright: It does not seem——

The Court: They find in favor of you on your charges. If they find no damages, they still established a liability. They are only entitled to damages if you find damage has occurred.

It seems to me under the evidence of the case this jury could conceivably find a violation of the Anti-Trust laws without any actual amount of damages.

Mr. Shea: This is clearly the verdict, your Honor. I do not see much you can do about it.

Mr. Wright: That is what they did. I suggest that I do not see how the instructions of the Court could have been followed and this result reached. But——

Mr. Shea: This is their verdict. I do not see anything you can do.

The Court: I am going to ask them to go back and ask them to assess damages, even it is nominal.

Mr. Gates: You do not have a right to, Your Honor.

Mr. Shea: No, Your Honor.

The Court: Is there any authority for that?

Mr. Shea: Yes, Your Honor.

The Court: Can you have a violation of anti-trust laws and find liability without damages?

Mr. McGlothlin: That is what the statute says, your Honor.

Mr. Shea: Your Honor, take their verdict and then you decide what the interpretation here should be. Take their verdict and then interpret it.

The Court: If there are no damages, it ought to be a verdict for the Defendant.

Mr. Shea: Your Honor interprets it.

Mr. Ball: This will be entered with the verdict, your Honor.

The Court: I think I will let the jury go back out and tell them that I am not going to accept this verdict, unless they make some assessment as to nominal damages—it can be any amount they wish to put in there.

Mr. McGlothlin: Your Honor——

Mr. Rhoads: We object to that.

Mr. McGlothlin: That is reversible error. These jurors have found he was not injured in his property or business. That is the statute. That is what the anti-trust laws say.

Mr. Wright: I think there is no verdict, if they go out and return a verdict for these defendants, it is another matter.

Mr. McGlothlin: We are entitled to have this verdict entered on the records of the Court.

Mr. Wright: They either return a verdict for the Defendant or for the Plaintiffs. But, if it is plaintiff, they assess damages.

Mr. Shea: His Honor put his charge very properly. The issues are defined. Now, you also gave them this verdict, and it seems to me that they have been fully—you accept the verdict and then we will argue out the question of interpretation of it. This is a simple way to do it.

Mr. Ball: Take a short recess.

The Court: Before we answer this last question, we will take a short recess. Ask the jury to retire.

(In Open Court.)

(The jury retired to the jury room, 3:25 p. m.)

The Court: It seems to me I should tell the jury again the three things they should consider: One is whether or not the conspiracy alleged by the Plaintiff, if that has been proved, was there a causal connection.

Was there any damages suffered by the Plaintiff.

If he suffered damages, the amount of the damages.

Now, if he suffered no damages, does it make any difference whether there is a violation of the Anti-Trust Law's?

Mr. McGlothlin: In my opinion, it does not. This is the final verdict which I think we are entitled to have entered on the records of the Court.

Mr. Gates: That is right.

Mr. McGlothlin: In order to recover, you have five things: Conspiracy, the dangerous probability; you have the intent that relates to the rate reductions; you have the multiple causation problem. Only then do you get the amount.

They have come back and told your Honor under the charges you gave them, we do not find one of those elements.

The Court: Why didn't they find for the defendants, then?

Mr. Wright: I think——

The Court: Excuse me. Just a moment.

Mr. McGlothlin: We are entitled to have this verdict made a part of the record of this Court. If your Honor wants to take action thereafter with respect to it, you have that power. Certainly, this is a verdict signed by the Foreman, agreed to by the jury and brought in and reported to——

The Court: I do not have to accept it. I do not think it is a legal verdict.

Mr. McGlothlin: I understand——

Mr. Shea: May I make a suggestion?

The Court: Yes.

Mr. Shea: You gave the best charge that could be given. What I want to suggest to your Honor is this: You have given them the fullest charge, gave them time to deliberate. You gave them the form of the verdict. They

came in and filled it out and responded to every question. Now, on the question of interpretation, we can argue that out.

The Court: That is just what is going to happen. You are going to argue for a directed verdict. Certainly you are.

Mr. Gates: Certainly.

The Court: Just a minute. I do not have to take what I think might be an illegal verdict.

I am going to tell them if they find for the Plaintiff against two or more of the defendants, if they find any damages—it can be any amount, nominal or any amount. If they do not find any damages, then they ought to find for the defendants.

Mr. McGlothlin: If they find no damages, they should find for the defendants.

The Court: That is what the law is.

Mr. Wright: They have disregarded your Honor's instructions to return a general verdict.

The Court: I am going to tell them if they find no damages—they have to find damages even if it is six cents.

Mr. Ball: You have that point, your Honor.

The Court: Yes, I am going to make it clear to them.

Mr. McGlothlin: I would let it lie, but I am not in charge.

Mr. Shea: You have something there, your Honor.

Mr. Wright: There is one thing more on this.

The Court: I am going to read the damage charge.

Mr. Wright: I wish to make a formal motion for a mistrial. I think that the Jury has so far misunderstood the Court's instructions that there could be no proper verdict at this point. I would like to make a formal motion for mistrial on that ground.

The Court: I will get the part of the charge on damages and I will read it again.

Mr. Gates: They left your charge on my table, your Honor, I will get it for you.

Mr. Rhoads: May I make objection in advance to any suggestion that the jury, in the face of its present verdict, may render a six-cent or nominal damage amount as damages.

The Court: I will instruct the jury what I think the law is.

Mr. Rhoads: Thank you, sir. I wanted my objection on the record.

The Court: Yes.

SUPPLEMENTAL INSTRUCTIONS BY THE TRIAL COURT.

The Court: Now, Mr. Foreman, and Ladies and Gentlemen of the Jury: The Court believes and feels that you probably have not quite either comprehended or understood the Court's charge on the question of damages. The Court will first refer to that particular part of the charge and I will read it to you.

"I will not instruct you with respect to damages and the standards which the Plaintiff must meet to sustain its burden of proving that it has been damaged.

"You are not to assume from the fact that I instruct you on damages that I hold to the view that the Plaintiff has or has not proved that any of the defendants engaged in a conspiracy, or that any of them engaged in any acts in furtherance of such a conspiracy, or that the Plaintiff has or has not been damaged. These matters are, of course, for you, the Jury, to decide. Plaintiff has the burden of proving the existence of the causal relationship between defendants' alleged misconduct and injury to the Plaintiff. That is, it must prove by a fair preponderance of the evidence that its business or property has in fact been damaged as a direct result of a conspiracy, as previously defined, among two or more of the Defendants.

"Proof of this necessary causal relationship requires something more than proof that one or more of the defend-

ants did something at or about the same time that the Plaintiff's business declined.

"Now, to simplify the matter, there are three things you must find in a civil anti-trust suit: First, that the conspiracy or combination has been proved by a fair preponderance of the evidence as alleged by the Plaintiff:

"Second, that there was a causal relationship between that business, that conspiracy and some damage to the Plaintiff's business; then, if you find that there was damage to the Plaintiff's business, how much was the damage? Now it does not make any difference what the damage was. It can be nominal damage. I am not suggesting you arrive at any amount. There is no minimum or no maximum—no minimum, at least. In other words, if you believe that there was a conspiracy as the Plaintiff alleged, and that there was a causal connection between the conspiracy and any damages to the Plaintiff: But, if you believe there were no damages, then, of course, as I think I have indicated before, I think the defendants are entitled to a verdict. But, if you find even a nominal sum for the Plaintiff, you believe the conspiracy existed, there was a causal relationship between the conspiracy and damage to the plaintiff's business, then you can assess the damage in any reasonable amount or any amount that you think the plaintiff was damaged."

The Court does not believe this is a legal verdict. I am going to ask you to return to your jury room and deliberate further. I will not accept this verdict.

Just a minute. I will hear you after the jury retires. Then I will hear counsel.

Mr. Ball: Thank you, Your Honor.

(The jury retired at 3:31 o'clock p. m.)

The Court: All right, Mr. Wright.

Mr. Ball: I think the Court misspoke itself. I think the Court did not intend that it did not accept the verdict with respect to those defendants.

The Court: Well, we will come to that. We will cross that bridge when we come to it.

Mr. Wright: I would like to make a formal motion for a mistrial and move that the jury be discharged upon the ground that they have so completely misunderstood the Court's instructions in the case that there could be no fair verdict from this jury.

The Court: Well, I will deny the motion.

Mr. McGlothlin: I would like to enter a formal motion that judgment be entered for the defendants upon the verdict as handed to your Honor.

The Court: The Court does not believe, as the verdict was handed to the Court, that that was a legal verdict, and the Court feels that, in order to constitute a violation of the anti-trust laws some damage must have existed or occurred, no matter whether it is two cents or six cents or $10,000. It does not make any difference. Those are the three things I am sure you must prove. The Court will not accept the verdict. I have ruled on that.

Mr. Shea: Your Honor——

Mr. Rhoads: May I approach?

The Court: Just a minute. I will hear everyone.

Mr. Shea: I take it no such problem exists with respect of those defendants for whom the jury has found for the Defendants.

The Court: They undoubtedly will find the same way.

Mr. Shea: They have already found. They have already announced their verdict in respect of the defendants for whom they have found.

The Court: I understand that.

Mr. Shea: I take it your Honor has not——

The Court: I have not formally received the verdict. I do not think it is a legal verdict in its present form.

Mr. Shea: I take it, your Honor, your only problem is with respect to the question of those defendants in regard to which the jury has found for the Plaintiff and

has found no damages. There is no problem certainly about it——

The Court: We will decide that later.

Now, Judge Rhoads, do you wish to say something?

Mr. Rhoads: May I formally object to that portion of your Honor's additional charge in which you suggested that the jury might retire and find damages in any amount against any of the defendants in this case.

The Court: Any amount. I said they may find nominal damages in a reasonable amount.

Mr. Rhoads: I meant your reference to nominal damages or any other amount.

The Court: We will take an adjournment.

Mr. Gates: Your Honor——

The Court: You want to make an objection. All right.

Mr. Gates: I assume objections which have been registered by other defense counsel are preserved for all defense counsel; am I correct in that?

The Court: That is correct.

Mr. Shea: May I make a formal motion for a judgment on the verdict with respect to the Atlantic, Southern Railway and Atlantic Seaboard?

The Court: Motion is denied.

(At 3:40 o'clock p. m., Court recessed until return of Court.)

THE JURY'S SECOND, FINAL VERDICT.

4:30 p. m.

(The jury is absent from the courtroom.)

Mr. Rhoads: May I be heard before the jury returns?

The Court: Yes. All right, Colonel Rhoads.

Mr. Rhoads: Your Honor pleases, before the jury returns, I would like formally to object to the refusal of your Honor to accept and record the verdict of the jury

as rendered; to your Honor's refusal to discharge the jury upon the rendition of the verdict; to your Honor's further refusal to enter judgment for all defendants on the verdict as rendered; further, to your Honor's supplemental charge and particularly to that portion of your Honor's charge to the jury in which the Court indicated and directed to the jury that it should retire and consider further whether damages in any amount may or should be found against any of the defendants; and, in effect, thereby requiring the jury to reconsider a verdict, and render a verdict, in some amount, against the five defendants against whom the verdict was entered as recorded by the jury.

Further, to your Honor's refusal to accept the verdict in favor of those defendants in whose favor the jury did render a verdict.

The Court: Well, Colonel Rhoads, all I can say to you is that the Court did not formally receive the entire verdict. It was not a complete verdict of the jury until the amount was stated. The Court felt that it is not a violation of the Clayton Act, Section 4 of the Clayton Act, unless the jury first finds that there was a conspiracy or combination and restraint of trade, or to drive Riss out of business.

They must further find, as a result of that conspiracy, the Plaintiff, or Riss was damaged.

They must further find to what extent he was damaged. Now, it is the purpose of the Clayton Act, I think —if the jury stated that they, in effect, found a conspiracy against five defendants, I think that was the number—five defendants—but they found no damages then, under the instructions of the Court, the Court feels that the jury should have returned a verdict for the defendants. Therefore, the Court felt that the jury probably did not quite understand the charge on damages, or that it did not properly apply that charge that I gave.

I feel that under the circumstances the jury had a right, or I had a right to properly instruct the jury or re-read what I told them in my general charge and have them retire to the jury room. That is done quite often in cases where the jury is confused on some question of law.

Your objections are noted.

Mr. Rhoads: May I simply reply, sir, that it is our theory and understanding, that as the jury has found a verdict that there were no damages against any defendant, that under such circumstances, the verdict as rendered is tantamount to a verdict in favor of all defendants.

The Court: Very well. You have your objections noted. Bring in the jury.

(The jury were in the jury box at 22 minutes before 5 o'clock p. m.)

Deputy Clerk: Mr. Foreman, may I have the verdict?

The Foreman: Yes. (Handing verdict to Clerk.)

(The verdict was handed to the Court.)

Deputy Clerk: Mr. Foreman, will you please rise? What is the amount of your verdict?

The Court: No, no. Let us start from the beginning and go all the way through this form of verdict again. I have not formally received the verdict. Now, start, from the beginning.

Mr. Walther, if you are tired, I think you may be seated.

The Foreman: I feel better standing up.

The Court: All right.

Deputy Clerk: What is your verdict as to the Plaintiff against each of the following defendants?

The Association of American Railroads?

The Foreman: For the Defendant.

Deputy Clerk: The Association of Western Railways?

The Foreman: For the Plaintiff.

Deputy Clerk: Traffic Executives Association—Eastern Railroads?

The Foreman: For the Plaintiff.

Deputy Clerk: Eastern Railroad Presidents' Conference?

The Foreman: For the Plaintiff.

Deputy Clerk: Carl Byoir & Associates, Inc.?

The Foreman: For the Plaintiff.

Deputy Clerk: Atlantic Coast Line Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: Atchison, Topeka & Santa Fe Railway Company?

The Foreman: For the defendants.

Deputy Clerk: Baltimore & Ohio Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: Chesapeake & Ohio Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: Chicago, Burlington & Quincy Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: Chicago, Milwaukee & St. Paul and Pacific Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: Chicago and Northwestern Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: Chicago, Rock Island and Pacific Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: Erie Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: Great Northern Railway Company?

The Foreman: For the Defendant.

Deputy Clerk: Illinois Central Railroad Company?

The Foreman: For the Defendant.

Deputy Clerk: Missouri-Kansas-Texas Railroad Company.

The Foreman: For the Defendant.

Deputy Clerk: Missouri-Pacific Railroad Company?
The Foreman: For the Defendant.
Deputy Clerk: New York Central Railroad Company.
The Foreman: For the Defendant.
Deputy Clerk: Northern Pacific Railway Company?
The Foreman: For the Defendant.
Deputy Clerk: The Pennsylvania Railroad Company?
The Foreman: For the Plaintiff.
Deputy Clerk: St. Louis-San Francisco Railway Company?
The Foreman: For the Defendant.
Deputy Clerk: Southern Pacific Company?
The Foreman: For the Defendant.
Deputy Clerk: Union Pacific Railroad Company?
The Foreman: For the Defendant.
Deputy Clerk: Wabash Railroad Company?
The Foreman: For the Defendant.
Deputy Clerk: Minneapolis, St. Paul, Sault Ste. Marie Railroad Company?
The Foreman: For the Defendant.
Deputy Clerk: Southern Railway Company?
The Foreman: For the Defendant.
Deputy Clerk: Seaboard Air Line Railroad Company?
The Foreman: For the Defendant.
Deputy Clerk: What is the amount of your verdict?
The Foreman: $75,000.

...v. 4056-57

...oc. of ... C.C.,
...t. ...

FORM OF VERDICT

What is your verdict as to the plaintiff against each of the following defendants?

FILED
8 1961
HENRY H. HULL, CLK

(1) Association of American Railroads

For Plaintiff _____ For Defendant For Defendant

(2) Association of Western Railways

For Plaintiff For Plaintiff ✓ For Defendant _____

(3) Traffic Executive Association - Eastern Railroads

For Plaintiff For Plaintiff ✓ For Defendant _____

(4) Eastern Railroad Presidents Conference

For Plaintiff For Plaintiff ✓ For Defendant _____

(5) Carl Byoir & Associates, Inc.

For Plaintiff For Plaintiff ✓ For Defendant _____

(6) Atlantic Coast Line Railroad Company

For Plaintiff _____ For Defendant For Defendant ✓

(7) Atchison, Topeka & Santa Fe Railway Company

For Plaintiff _____ For Defendant For Defendant ✓

(8) Baltimore & Ohio Railroad Company

For Plaintiff _____ For Defendant For Defendant ✓

(9) Chesapeake and Ohio Railway Company

For Plaintiff _____ For Defendant For Defendant ✓

(10) Chicago, Burlington & Quincy Railroad Company

For Plaintiff _____ For Defendant For Defendant ✓

(11) Chicago, Milwaukee, St. Paul & Pacific Railroad Company

For Plaintiff _____ For Defendant For Defendant ✓

(12) Chicago and Northwestern Railway Company

For Plaintiff	For Defendant
	For Defendant ✓

(13) Chicago, Rock Island & Pacific Railroad Company

For Plaintiff	For Defendant
	For Defendant ✓

(14) Erie Railroad Company

For Plaintiff	For Defendant
	For Defendant ✓

(15) Great Northern Railway Company

For Plaintiff	For Defendant
	For Defendant ✓

(16) Illinois Central Railroad Company

For Plaintiff	For Defendant
	For Defendant ✓

(17) Missouri-Kansas-Texas Railroad Company

For Plaintiff	For Defendant
	For Defendant ✓

(18) Missouri Pacific Railroad Company

For Plaintiff	For Defendant
	For Defendant ✓

(19) New York Central Railroad Company

For Plaintiff	For Defendant
	For Defendant ✓

(20) Northern Pacific Railway Company

For Plaintiff	For Defendant
	For Defendant ✓

(21) The Pennsylvania Railroad Company

For Plaintiff	For Defendant
For Plaintiff ✓	

(22) St. Louis-San Francisco Railway Company

For Plaintiff	For Defendant
	For Defendant ✓

(23) Southern Pacific Company

For Plaintiff	For Defendant
	For Defendant ✓

(24) Union Pacific Railroad Company

_____ For Defendant ✓
For Plaintiff

(25) Wabash Railroad Company

_____ For Defendant ✓
For Plaintiff

(26) Minneapolis, St. Paul & Sault Ste. Marie Railroad Company

_____ For Defendant ✓
For Plaintiff

(27) Southern Railway Company

_____ For Defendant ✓
For Plaintiff

(28) Seaboard Air Line Railroad Company

_____ For Defendant ✓
For Plaintiff

If your verdict is in favor of the plaintiff against two or more of the defendants, what is the total amount of your verdict?

$ ~~None~~ 15,000 ✓

Ethan Hatcher
FOREMAN

November 5, 1960
Date

United States District Court for the District of Columbia.

Riss & Co., Inc., Plaintiff, vs. Association of American Railroads et al., Defendants.	}	Civil Action. No. 4056-54.

VERDICT AND JUDGMENT.

(Filed Nov. 8, 1960. Harry M. Hull, Clerk.)

This cause having come on for hearing on the 5th day of January, 1960, before the Court and a jury of good and lawful persons of this district, to wit:

Mrs. Mary E. Shaw,	Mr. James E. Jones,
Mrs. Sarah E. Smith,	Miss Grace M. Hinze,
Mr. Ethan Walther,	Mr. Joseph E. Leszcynski,
Mr. Charles H. Puree,	Mrs. Agnes R. Stover,
Mrs. Lillian W. Harry,	Mr. Wesley T. Bellamy,
Mrs. Mabel K. Wells,	Miss Nellie R. Boyette,

who, after having been duly sworn to well and truly try the issues between Riss & Co., Inc., plaintiff, and Association of American Railroads, et al., defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 5th day of November, 1960, that they find for the defendants Association of American Railroads, Atlantic Coast Line Railroad Company, The Atchison, Topeka & Sante Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad

Company, Chicago and North Western Railway Company, Chicago, Rock Island & Pacific Railroad Company, Erie Railroad Company, Great Northern Railway Company, Illinois Central Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, New York Central Railroad Company, Northern Pacific Railway Company, St. Louis-San Francisco Railway Company, Southern Pacific Company, Union Pacific Railroad Company, Wabash Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Southern Railway Company and Seaboard Air Line Railroad Company against the plaintiff; and the jury further finds in favor of the plaintiff versus defendants Association of Western Railways, Traffic Executive Association—Eastern Railroads, Eastern Railroad Presidents Conference, Carl Byoir & Associates, Inc., and The Pennsylvania Railroad Company, and that the money payable to it by the said defendants by reason of the premises is the sum of Seventy-five Thousand ($75,000.00) Dollars. And, further, by direction of the Court and pursuant to Section Four of the Clayton Act, the award to the plaintiff in this case will be three (3) times the amount of the verdict of the Jury, besides costs of the suit and a reasonable attorney's fee.

Wherefore, it is adjudged that the said plaintiff take nothing by this action as to defendants Association of American Railroads, Atlantic Coast Line Railroad Company, The Atchison, Topeko & Sante Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Chicago and North Western Railway Company, Chicago, Rock Island & Pacific Railroad Company, Erie Railroad Company, Great Northern Railway Company, Illinois Central Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific

Railroad Company, New York Central Railroad Company, Northern Pacific Railway Company, St. Louis-San Francisco Railway Company, Southern Pacific Company, Union Pacific Railroad Company, Wabash Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Southern Railway Company and Seaboard Air Line Railroad Company, that said defendants go hence without day, be for nothing held and without costs.

And Further, It Is Adjudged that the plaintiff recover of defendants Association of Western Railways, Traffic Executive Association—Eastern Railroads, Eastern Railroad Presidents Conference, Carl Byoir & Associates, Inc., and The Pennsylvania Railroad Company the sum of Two Hundred Twenty-five Thousand Dollars ($225,000.00), plus a reasonable attorney's fee to be hereafter fixed, together with costs.

Harry M. Hull,

Clerk,

By /s/ Daniel J. Mencoboni,

Deputy Clerk.

By direction of John J. Sirica, Judge.

United States District Court for the District of Columbia.

Riss & Company, Inc., Plaintiff, v. Association of American Railroads et al., Defendants.	Civil Action. No. 3056-54.

ORDER.

Plaintiff having filed a Motion for Allowance of Attorneys' Fees to Plaintiff on February 13, 1961, pursuant to Section 4 of the Clayton Act (15 U. S. C. A., § 15) and the judgment entered in this cause on November 8, 1960, and defendants (2) The Association of Western Railways, (3) Traffic Executive Association—Eastern Railroads, (4) Eastern Railroad Presidents Conference, (5) Carl Byoir & Associates, Inc., and (66) The Pennsylvania Railroad Company having filed memoranda with respect thereto on December 6, 1960, March 1, 1961, and March 10, 1961, and the Court having considered said motion and the memoranda with respect thereto and the oral argument of March 17, 1961, on said motion, it is this 20th day of March, 1961

Ordered that defendants (2) The Association of Western Railways, (3) Traffic Executive Association—Eastern Railroads, (4) Eastern Railroad Presidents Conference, (5) Carl Byoir & Associates, Inc., and (66) The Pennsylvania Railroad Company pay to plaintiff as an Attorneys' Fee the sum of One Hundred Twelve Thousand Five Hundred ($112,500.00) Dollars.

John J. Sirica,
United States District Judge.

United States Court of Appeals
For the District of Columbia Circuit.

No. 16206.

Association of Western Railways, et al., Appellants,

v.

Riss & Company, Inc., Appellee.

No. 16255.

The Atchison, Topeka & Santa Fe Railway Company, et al., Appellants,

v.

Riss & Company, Inc., Appellee.

No. 16376.

Association of Western Railways,
Traffic Executive Association-Eastern Railroads,
Eastern Railroad Presidents Conference,
Carl Byoir and Associates, Inc.,
and the
Pennsylvania Railroad Company,
Appellants,

v.

Riss & Company, Inc., Appellee.

Appeals from the United States District Court
for the District of Columbia.

OPINION BELOW.

Decided January 25, 1962.

Mr. Stuart S. Ball, with whom **Mr. Richard J. Flynn** was on the brief, for appellant Association of Western Railways in Nos. 16206, 16376, and appellant The Atchison, Topeka

& Santa Fe Railway Company and certain other appellants in No. 16255.

Mr. James H. McGlothlin, with whom **Messrs. Thaddeus Holt** and **William H. Greer, Jr.**, were on the brief, for appellant Traffic Executive Association and certain other appellants in Nos. 16206, 16376, and appellant Pennsylvania Railroad Company in No. 16255.

Mr. A. Alvis Layne, with whom **Mr. Lester M. Bridgeman** was on the brief, for appellee.

Before Wilbur K. Miller, **Chief Judge**, and Edgerton and Bastian, **Circuit Judges**.

Edgerton, **Circuit Judge**: Appellee Riss & Company, Inc. (Riss), an interstate trucker, sued 85 railroads, four railroad associations, and a public relations firm, charging them with conspiracy to monopolize and eliminate Riss's competition in transportation of ammunition and explosives for the United States, in alleged violation of §§ 1 and 2 of the Sherman Act. The plaintiff asked damages and injunctive relief. Many defendants were dismissed before trial. Two paid Riss $15,000 each for a covenant not to sue. Riss's claim against the remaining 28 defendants was tried on about 120 days during a ten-month period.

The court gave the jury a "Form of Verdict" on which the name of each defendant was listed and was followed by the words "For Plaintiff" and also the words "For Defendant". At the end of the form were these words: "If your verdict is in favor of the plaintiff against two or more of the defendants, what is the total amount of your verdict? $ .....". After deliberating some ten days, the jury returned a verdict on this form. It found "For" the plaintiff against five of the defendants, namely, The Pennsylvania Railroad Company, three railroad associations, and the public relations firm; "For" each of the

other 23 defendants; and "$ None" as the "total amount of your verdict".

After giving a supplemental charge which our view of the case makes it unnecessary to consider, the court said: "The Court does not believe this is a legal verdict. I am going to ask you to return to your jury room and deliberate further. I will not accept this verdict." The jury retired again. Slightly more than an hour later it brought in an altered verdict on the same form it had used before. After "$", the word "None" had been crossed out and "75,000" had been written in. The court denied the five defendants' motions for judgment n. o. v., granted costs against them, denied costs to the 23 other defendants, refused to reduce the new verdict by the $30,000 which two former defendants had paid Riss before trial, trebled the damages under § 4 of the Clayton Act, and entered judgment against the five defendants. The court also entered judgment allowing Riss an attorney's fee of $112,500. The five defendants appeal in Nos. 16206 and 16376.

Both the complaint and the evidence were largely though not entirely concerned with efforts of the defendants to influence legislative and administrative action. The principal question of law was whether the Sherman Act condemns such efforts when they are jointly made for the purpose of destroying or restricting competition. The District Court answered this question in the affirmative and instructed the jury accordingly, relying expressly on the similar case of **Noerr Motor Freight, Inc., v. Eastern Railroad Presidents Conference** which had recently been decided by the District Court for the Eastern District of Pennsylvania and affirmed, over the dissent of Chief Judge Biggs, by the Court of Appeals for the Third Circuit. 155 F. Supp. 768, 273 F. 2d 218.

Four months after our District Court decided the present case, the Supreme Court reversed **Noerr. Eastern Railroad**

Presidents Conference v. Noerr Motor Freight, Inc., 365 U. S. 127. A group of truckers and their trade association had sued under § 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads, a railroad association, and a public relations firm, charging them with conspiring to restrain trade in and to monopolize transportation of freight in alleged violation of §§ 1 and 2 of the Sherman Act. The Supreme Court held, contrary to the District Court's instructions to the jury in the present case, that joint solicitation of government action with respect to the passage or enforcement of laws does not violate the Sherman Act, even if its purpose is to destroy competition and even if deceitful propaganda is used. Irrespective of any other evidence in the present case, therefore, and irrespective of any other error, the District Court's judgments cannot stand.

We must reverse the judgments for another reason also. The District Court erred in failing to accept the verdict which the jury first returned. That verdict plainly meant that five of the defendants had conspired and plainly meant, also, that the conspiracy had not damaged Riss. Section 4 of the Clayton Act allows treble damages, and costs including an attorney's fee, to a person who is "injured in his business or property by reason of anything forbidden in the antitrust laws". 15 U. S. C. § 15. The "gist of the action is not merely the unlawful conspiracy . . . but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law." **Glenn Coal Co. v. Dickinson Fuel Co.**, 72 F. 2d 885, 887. **Keogh v. Chicago & N. W. Ry.**, 260 U. S. 156; **Hunter Douglas Corp. v. Lando Products, Inc.**, 235 F. 2d 631. The finding that the conspiracy had not damaged the plaintiff was therefore a finding that the plaintiff had not proved its claim. The defendants were therefore entitled to judgment.

Appellee contends that the jury's first verdict was ambiguous, and that the trial court was therefore within its discretion in refusing to receive the verdict and in returning the case to the jury with supplemental instructions. The conclusion may follow from the premise, but the premise is erroneous. We find no ambiguity in the verdict. Its formal oddity is unimportant. "In several cases, a verdict for the plaintiff which affirmatively states that it is for no amount of damages, has been held to warrant the entry of a judgment for the defendant."[1] In **Poydock v. Adams Transfer & Storage Co.**, a negligence suit, the jury found a verdict in favor of the plaintiff "in the sum of none . . .." The court said: "Despite its rather peculiar form, the verdict can be interpreted only as a finding in favor of the defendant." 51 F. Supp. 374. In **Schwab v. Nordstrom**, 138 Kan. 497, 27 P. 2d 242, an action for assault, the jury returned a verdict for the plaintiff and found "no damages actual or punitive . . .." The court said: "It is clear that the jury found that none of the parties claiming damages had made out a case in which he was entitled to recover damages." 27 P. 2d at 243. In **Chapin v. Foege**, 296 Ill. App. 96, 15 N. E. 2d 943, a negligence suit, the jury's verdict was "guilty", damages "no dollars". The court entered judgment denying recovery. In **Royal Indemnity Co. v. Island Lake Township**, 177 Minn. 408, 225 N. W. 291, the verdict was: "We . . . find for the plaintiff and assess damage in the sum of none dollars." The appellate court said: "It had the same effect as, and was in fact though not in form, a verdict for defendant." 225 N. W. at 292. In **Daniels v. Celeste**, 303 Mass. 148, 21 N. E. 2d 1, after a jury returned a verdict for the plaintiff with damages in "the sum of No Dollars and No Cents", the court directed the jury to return a verdict for the de-

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[1] 9 ALR 2d 1334 (1956). The cases have not been unanimous. 116 ALR 834 (1938). 49 ALR 2d 1331 (1956).

fendant. Cf. **Washington Market Co. v. Clagett**, 19 App. D. C. 12, 28.

The jury's original verdict was and is valid. The alteration which resulted from the court's erroneous rejection of the verdict is not valid. Judgments for all the defendants should have been entered at the trial and should be entered now. 62 Stat. 963 (1948), 28 U. S. C., § 2106 (1958). **Dextone Co. v. Building Trades Council**, 60 F. 2d 47.

Railroad defendants counterclaimed against Riss for alleged violations of the Sherman Act by conspiring with other truckers to fix rates and thereby divert from the counterclaimants profitable traffic that they would otherwise have carried. No. 16255 is the railroads' appeal from a summary judgment for Riss on this counterclaim. We agree, generally, in essential respects, with the district judge's views regarding the counterclaim. **Riss & Company v. Association of American Railroads**, 190 F. Supp. 10. The evidence proffered by the counterclaimants does not appear to us to raise an issue of material fact in support of their claim that they were injured by the alleged illegal rates.

Nos. 16206 and 16376 **reversed.**

No. 16255 **affirmed.**